not reported

127-189

(H)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 226.

GEORGE C. RICHARDSON, GEORGE K. GUILD, HARRISON GARDNER ET AL., APPELLANTS,

vs.

CHARLES B. DAY, WILLIAM JACK AND LESLIE D. PUTERBAUGH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED MAY 8, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 226.

GEORGE C. RICHARDSON, GEORGE K. GUILD, HARRISON GARDNER ET AL., APPELLANTS,

vs.

CHARLES B. DAY, WILLIAM JACK AND LESLIE D. PUTERBAUGH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Bond for costs	2	1
Bill of complaint	2	1
Subpœna	12	6
Marshal's return	13	6
Demurrer of Charles B. Day	14	7
Wm. Jack *et al.*	16	8
Petition of Simpson Sons & Co., to be made parties complainants	18	10
Order that " " " "	20	10
Submission of demurrer	22	10
Opinion	25	12
Order sustaining demurrer	30	12
Decree	25	12
Appeal bond	27	12
Clerk's certificate	30	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 8, 1887.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the United States circuit court for the seventh circuit, on Wednesday, the eleventh day of March, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and ninth year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

GEORGE C. RICHARDSON, GEORGE K. GUILD, HARRISON GARDNER, CHARLES S. SMITH, WALTER M. SMITH, and RALPH L. CUTTER
vs.
CHARLES B. DAY, WILLIAM JACK, and LESLIE D. PUTERBAUGH. } In Chancery.

Be it remembered that on the fourth day of December, A. D. 1884, came the complainants, by their solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their bond for costs and bill of complaint in said entitled cause; which said bond and bill are, respectively, in the words and figures following, to wit:

2 *Bond.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court. Dec. Term, A. D. 18—.

GEO. C. RICHARDSON *et al. vs.* CHAS. B. DAY *et al.*

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the complainants of any costs ordered or adjudged to be paid by them hereby agree and stipulate that execution may issue against our property for any costs taxed against complainants.

Dated this 4th day of Dec., A. D. 1884.

FLOWER, REMY & GREGORY.

Endorsed: Filed Dec. 4, A. D. 1884. Wm. H. Bradley, clerk.

Bill.

To the judges of the circuit court of the United States for the northern district of Illinois, in chancery sitting:

Your orators, George C. Richardson, George K. Guild, and Harrison Gardner, of Boston, who are citizens of the State of Massa-

3 chusetts; Charles S. Smith and Walter M. Smith, of Stamford, who are citizens of the State of Connecticut, and Ralph L. Cutter, of New York city, who is a citizen of the State of New York, and who together are partners doing business under the name of George C. Richardson, Smith & Co., bring this bill of complaint against Charles B. Day, William Jack, and Leslie D. Puterbaugh, of Peoria, who are citizens of the State of Illinois and residents of said northern district thereof, on behalf of your orators and of all other creditors (who may come in and contribute to the expenses of this suit) of Lucius L. Day, Gardis R. Cobligh, Norman S. King, Samuel H. Van Scikler, Herbert T. Day, and William G. Marsters, who were lately partners under the name of Day Brothers & Co., and thereupon your orators, complaining, say—

That on the 6th day of August, 1884, said Day Brothers & Co. were and still are indebted to your orators in the sum of seventy-seven hundred and thirty-six $\frac{34}{100}$ dollars, and were doing business at Peoria, Illinois, as wholesale and retail dealers in dry goods, and so continued up to about the 28th day of September, 1884, at which time they had on hand merchandise of the value of about three hundred thousand dollars and outstanding accounts, bills receivable, and other property of the nominal value of about forty thousand dollars, and were owing about the sum of five hundred

4 thousand dollars, a large part of which was overdue, and were grossly insolvent. They then owed the defendant, Charles B. Day, who is a brother of said Lucius L. Day and was formerly a partner in said business with him, a large amount of money, and said Charles B. Day was endorser and otherwise liable on the commercial paper of said Day Brothers & Co. & otherwise to the amount five hundred thousand dollars, or thereabouts.

The insolvent condition of said Day Brothers & Co. was then well known and understood by them and by the defendant, Charles B. Day, and that the firm must immediately fail and retire from business.

Whereupon it became and was their duty, under the policy of the laws of the State of Illinois, to make a voluntary assignment of all their property for the equal benefit of all their creditors, and they then and there contemplated a final disposition of their property among their creditors in view of their insolvency and their immediately impending failure.

But inasmuch as by the laws of Illinois preferences are not allowed under such assignments, it was determined and agreed between said firm and the defendant, Charles B. Day, that said laws should, if possible, be evaded by a pretended sale and preference to him. Accordingly said Day Brothers & Co. made a bill of sale and transfer to him on or about said 28th day of September, 1884,

5 of all their merchandise and certain other property in pretended payment to him of their indebtedness to him and to secure him against liabilities which he was under for said firm, but really to give him a preference over the other creditors.

The property so sold was of the value of about $300,000 and the debt intended to be protected was about $200,000. The property was

immediately delivered over to said defendant, and said firm ceased to do business as such, leaving nothing in their hands or subject to their control except a lot of slow accounts and bills receivable & some other odds and ends of assets accumulated by said firm, but of very little immediately convertible value.

And your orators further allege that ten days after said bill of sale was so made said Day Brothers & Co., on the 8th day of October, 1884, made a voluntary assignment of all their property for the benefit of all their creditors to the defendants, William Jack and Leslie D. Puterbaugh, who have duly qualified and are acting as such, but delivered over to them only such property as remained after the pretended sale to the defendant, Charles B. Day, said to be of the value of forty thousand dollars, but really not worth half that sum. Said Jack & Puterbaugh, as such assignees, lay no claim to the property acquired by the defendant, Charles B. Day in the manner aforesaid, and have neglected to take any measures to recover
6 the same or any part thereof, and do not intend to move at all in the matter, pretending to believe the transfer unimpeachable by them.

And your orators further allege that in the schedules accompanying said assignment they are named as creditors to the amount of their claims hereinbefore stated; have proved and filed said claim, as required by law, and are beneficiaries in the trust created by said assignment. As such your orators charge and insist that said bill of sale and transfer of the assets of Day Brothers & Co. to the defendant, Charles B. Day, and the voluntary assignment to the defendants, Jack & Puterbaugh, are in equity parts of one and the same instrument, and together constitute a voluntary assignment for the benefit of creditors, with preferences, which preferences are unlawful, and that the entire property conveyed by Day Brothers & Co. to the defendant, Charles B. Day, inures by virtue of said instruments in trust from the date of its transfer to the defendants, Jack & Puterbaugh, as assignee-, and should be accounted for to and be administered by them as such, or by a receiver to be appointed by the court in this cause; yet said defendants, Jack & Puterbaugh, being as assignees the creation of said Day Bros. & Co. and subservient as far as possible to the purposes of their said creators, and being desirous that said defendant, Charles B. Day, shall retain and enjoy the preference by him attempted to be acquired as aforesaid, have
7 not undertaken and will not willingly undertake any measure to defeat the same or to recover said property for the benefit of your orators, and the other creditors in whose interest this bill is filed.

Wherefore your orators say that the only means of practically and honestly handling said property so conveyed to said C. B. Day is the appointment of a receiver by this court, to whom the said property shall be accounted for or delivered and converted, to abide the result of this suit.

Your orators make no charge of dishonesty or unfairness against said assignees, and none against their fitness to handle and administer said property, save those hereinbefore mentioned and such as

are suggested by their peculiar relations to the matter, and these, your orators charge, are quite sufficient to show the improbability, if not the impossibilty, of their fairly and vigorously attacking the transfer to said C. B. Day and securing the property involved to the creditors equitably entitled.

And your orators further allege that since said transfer to the defendant, C. B. Day, he has sold and disposed of divers of the merchandise and other property so transferred to him and converted the same into money in the ordinary way of trade, and has a large quantity of said property yet on hand, which he threatens and is about to so dispose of and convert, and will so do, to the great
8 and irreparable damage and detriment of your orators and other creditors, unless restrained by the injunction of this court.

In consideration whereof and forasmuch as your orators and the other creditors of Day Bros. & Co. are remediless in the premises by the strict rules of the common law, but only relievable in a court of equity, and to the end that the defendants may answer this bill (answer under oath being waived), and may show, if they can show, why your orators should not have the relief herein prayed; that the defendant, Charles B. Day, may state and set forth particularly the entire history of his dealings with said Day Brothers & Co. which culminated in the bill of sale & transfer of property to him hereinbefore mentioned; what was the quantity and cost value of the merchandise so transferred to him, giving the same in department lots as far as possible; what the value at which they were rated in said bill of sale and transfer; what was the description and value of all other property conveyed or turned over to him by said Day Bros. & Co. or either of them at about the same time or since then, and what, if any, securities were so given or turned over & their value; for what purpose was said transfer made, and what was talked of, discussed, and agreed concerning the matter between him and them or either of them before and at or about the time of said transfer; whether or not he knew the insolvent condi-
9 tion of said Day Bros. & Co. at the time of said transfer or had any reason to suspect it, and when such knowledge or suspicion first came to him and in what manner communicated; what indebtedness was then claimed to be due by Day Bros. & Co. or either and which of them to him, and in what form did it exist and how did it originate; for what liabilities he was under for said firm or any and which of its members as endorser, security, or otherwise, and to whom severally due, and in what form did they exist and what has become of such liabilities; what, if any, other consideration was given for said transfer and to whom; state fully all the facts concerning the indebtedness; what has become of the property so transferred to him; how much has been converted into money; how much sold on credit; how much remaining in hand, and what money remains in hand as proceeds, if any, of such property; what suits, if any, have been commenced to which he is in any manner a party seeking to charge him in any and what manner and what amounts and in favor of whom severally respecting

said property, and at what dates was process served on him in each;

And that said bill of sale or transfer by Day Bros. & Co. to the defendant, Charles B. Day, and all other conveyances and transfers accompanying the same, together with the voluntary assign-
10 ment to the defendants, Jack & Puterbaugh, may be construed together and decreed to be parts of one and the same transaction and to constitute a voluntary assignment for the benefit of creditors, with preferences; that the preferences be decreed to be void; that a receiver be appointed to take possession of all the remaining property of that transferred to the defendant, C. B. Day, and that the same be accounted for and delivered over to said receiver under the direction of a master of this court, and that said defendant account for and pay over under like direction the proceeds of all such property as has been sold or converted, whether in cash or credits, and that said receiver, under the order & direction of this court, proceed to convert the remaining property so to be turned over, and hold the whole subject to the final decree to be entered herein for the equal benefit of all the creditors of said Day Brothers & Co., without preferences; that in the meantime said defendant, Charles B. Day, be enjoined and restrained from further disposing of any of the property conveyed to him by said Day Brothers & Co. or either of them on or about the 28th day of September, 1884, or since then and the proceeds thereof, and that your orators may have such other and further relief as may be agreeable to equity and good conscience—

May it please the court to grant the usual writ of subpœna, commanding the appearance and answer of the defendants,
11 Charles B. Day, William Jack, and Leslie D. Puterbaugh, and the writ of injunction as prayed.

FLOWER, REMY AND GREGORY AND
TENNEY & BASHFORD,
Solicitors for Complainants.

J. M. FLOWER, *Of Counsel.*

STATE OF ILLINOIS, } ss:
Cook County, }

D. K. Tenney, being duly sworn, says he is one of the solicitors of the complainants in the foregoing bill named, which he has read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those he believes it to be true.

D. K. TENNEY.

Subscribed and sworn to before me this 4th day of December, 1884.

[SEAL.] STELLA M. WATERBURY,
Notary Public, Cook Co., Ill.

Endorsed: Filed Dec. 4, 1884. Wm. H. Bradley, clerk.

12 On the same day, to wit, on the fourth day of December, 1884, there issued out of said clerk's office a writ of subpœna in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

The United States of America to Charles B. Day, William Jack, & Leslie D. Puterbaugh, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of January next, to answer the bill of complaint of George C. Richardson, George K. Guild, Harrison Gardner, Charles S. Smith, Walter M. Smith, and Ralph L. Cutter this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid,
13 this 4th day of December, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 109th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court at Chicago aforesaid on or before the day to which the above writ is returnable the complainants' bill will be taken against them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have served the within writ within my district in the following manner, to wit: Upon Charles B. Day, therein named, on the 12th day of December, A. D. 1884; also upon Leslie D. Puterbaugh, therein named, on the 12th day of December, A. D. 1884, by personally delivering to each of them a true copy of the same on the aforesaid day.

I also served the same upon the following-named defendant, not having been able to find him to serve personally, by leaving a true copy for him at his usual place of abode with an adult person and a member of his family, to wit, upon William Jack, on the 12th day of December, A. D. 1884, with Tilley Ingham.

A. M. JONES, *U. S. Marshal,*
By R. D. SHERMAN, *Deputy.*

Endorsed: Filed Dec. 16, A. D. 1884. Wm. H. Bradley, clerk.

14 Afterwards, to wit, on the fifth day of January, 1885, came Charles B. Day, one of the defendants, by his solicitors, and filed in said clerk's office his demurrer to the bill of complaint in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

GEORGE C. RICHARDSON, SMITH & CO. *vs.* CHARLES B. DAY *et al.*

The demurrer of Charles B. Day, one of the defendants, to the bill of complaint of George C. Richardson *et al.*, complainants.

This defendant demurs to the said bill, and for cause of demurrer shows that the complainants have not in and by their said bill made or stated such a case as entitles them in a court of equity to any discovery or relief from or against these defendants or either of them touching the matters contained in the said bill or of any of such matters.

Wherefore this defendant demurs to the said bill and to all the matters and things therein contained, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer thereto, and prays to be dismissed

15 with his reasonable costs in this behalf sustained.

PUTERBAUGH & PUTERBAUGH AND
H. B. HOPKINS,
His Solicitors.

I certify that, in my opinion, the foregoing demurrer of Charles B. Day, defendant, to the bill of complaint of George C. Richardson *et al.*, complainants, is well founded in law and proper to be filed in the above cause.

S. D. PUTERBAUGH,
Sol. for Charles B. Day, Def't.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Charles B. Day, the defendant, on oath states that he has heard read the foregoing demurrer to the bill of complaint of George C. Richardson *et al.* in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

CHARLES B. DAY.

Subscribed and sworn to before me by the said Charles B. Day on this 26th day of December, 1884.

LESLIE D. PUTERBAUGH,
United States Commissioner for the Northern District of Illinois.

Endorsed: Filed Jan'y 5, 1885. Wm. H. Bradley, clerk.

16 Afterwards, to wit, on the sixth day of January, 1885, came William Jack and Leslie D. Puterbaugh, two of the defendants, by their solicitors, and filed in said clerk's office their demurrer to the bill of complaint in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

In the United States Circuit Court for the Northern District of Illinois. In Equity.

GEORGE C. RICHARDSON, SMITH & CO.

vs.

CHARLES B. DAY *et al.*

The demurrer of William Jack and Leslie D. Puterbaugh, defendants, to the bill of complaint of George C. Richardson *et al.*, complainants.

These defendants demur to the said bill, and for cause of demurrer show that the complainants have not in and by their said bill made or stated such a case as entitles them in a court of equity to any discovery or relief from or against those defendants or either of them touching the matters contained in the said bill or of any such matters.

Wherefore these defendants demur to the said bill and to all the matters and things therein contained, and pray the judgment
17 of this honorable court whether they shall be compelled to make any further or other answer thereto, and pray to be dismissed with their reasonable costs in this behalf sustained.

S. D. PUTERBAUGH,
Sol. — Defendants, William Jack and Leslie D. Puterbaugh.

I certify that, in my opinion, the foregoing demurrer of William Jack and Leslie D. Puterbaugh, defendants to the bill of complaint of George C. Richardson *et al.*, complainants, is well founded in law and proper to be filed in the above cause.

S. D. PUTERBAUGH,
Sol. for said Defendants.

UNITED STATES OF AMERICA, *Northern District of Illinois:*

Leslie D. Puterbaugh, one of said named defendants, on oath states that he has read the foregoing demurrer to the bill of complaint of George C. Richardson *et al.* in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings thereon.

LESLIE D. PUTERBAUGH.

Subscribed and sworn to before me by the said Leslie D. Puterbaugh on this 26th day of December, 1884.

[SEAL.]

L. HARMON,
Notary Public in and for the County of Peoria, in the State of Illinois.

Endorsed: Filed Jan'y 6, 1885. Wm. H. Bradley, cl'k.

18 Afterwards, to wit, on the tenth day of January, 1885, came William Simpson and others, by their solicitor, and filed in said clerk's office their petition in said entitled cause; which said petition is in the words and figures following, to wit:

Petition.

In the Circuit Court of the United States for the Seventh Circuit and Northern District of Illinois. In Chancery.

GEORGE C. RICHARDSON *et al.*, Compl'ts,
vs.
CHARLES B. DAY *et al.*, Def'ts.

To the Honorable Walter Q. Gresham, judge of the circuit court of the United States for the seventh circuit and northern district of Illinois, in chancery sitting:

The petition of William Simpson, William Simpson, Jr., "Estate Thomas Simpson," Lincoln Godfrey, and John N. Fraley, who are partners in trade, doing business under the firm name of "Wm. Simpson, Sons & Co.," all of whom are residents of the State of Pennsylvania, respectfully show unto your honor this suit is brought by the above-named complainants against the above-named defendants on their own behalf and on behalf of such other creditors as might make themselves complainants in said suit

19 and share the expenses of the same.

Your petitioners show to the court that on the twentieth day of December last past they recovered a judgment in the above court, on the law side thereof, against the above-named Lucius L. Day, Norman S. King, Hubert F. Day, William Masters, who were impleaded with Gardis R. Cobleigh and Samuel H. Van Sicklen, as partners in trade doing business under the firm name of "Day Bros. & Co.," for the sum of two thousand eight hundred and eighty-nine dollars and nine cents and costs of suit to be taxed, which said judgment is now in full force and effect, wholly unpaid and unsatisfied; and your petitioners pray that they may be permitted to become parties complainants to the above-entitled suit, hereby adopting the charges and allegations of the bill of complaint filed herein and the prayers for relief made by said complainants, so far as they are applicable to your petitioners, hereby offering to share in the expenses of said suit as may be equitable and just, and for such further or other relief as may be equitable and just in the premises.

WILLIAM SIMPSON, SONS & CO.,
Per L. S. HODGES.

L. S. HODGES,
Sol'r for Petitioners.

Endorsed: Filed Jan'y 10, 1885. Wm. H. Bradley, clerk.

20 On the same day, to wit, on the tenth day of January, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GEORGE C. RICHARDSON *et al.*
vs.
CHARLES B. DAY *et al.*
} In Chancery.

And now comes William Simpson, William Simpson, Jr., "Estate Thomas Simpson," Lincoln Godfrey, and John N. Fraley, partners doing business under the firm name of Wm. Simpson, Sons & Company, by L. S. Hodges, Esq., their solicitor, and present their petition to be joined as complainants in the above-stated suit.

And thereupon it is ordered by the court that said petitioners be, and are hereby, made parties complainant in accordance with the prayer of said petition.

21 Afterwards, to wit, on the ninth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GEORGE C. RICHARDSON *et al.*
vs.
CHARLES B. DAY *et al.*
} In Chancery.

Now come the parties herein, by their solicitors, and now comes on to be heard the defendants' demurrer to the bill of complaint herein, and, after hearing the arguments of counsel, the court takes the same under advisement.

22 Afterwards, to wit, on the sixteenth day of February, 1885, Judge Gresham delivered the following opinion in said entitled cause:

Opinion.

Circuit Court of the United States, Northern District of Ills.

GEORGE C. RICHARDSON & Others

vs.

CHARLES B. DAY, WILLIAM JACK, & LESLIE D. PUTERBAUGH

GRESHAM, *J.:*

The demurrer to the bill in this case was argued last Monday. Day Bros. & Co. were wholesale and retail dry goods merchants at Peoria, Ills. On the 28th of September, 1884, this firm was indebted to the defendant, Charles B. Day, late a member of the firm and a brother of one of the partners of the firm, in the sum of $200,000, and he was liable on the firm's paper for $500,000 more. On this date the firm transferred to Charles B. Day its entire stock of goods, worth $300,000, in discharge of the amount due him, and to secure

him against loss on account of his liability upon the firm's paper Charles B. Day at once took possession of the property transferred to him by bill of sale, which was the entire stock of goods, and the firm at once suspended and ceased to do business. On the
23 9th day of October following the insolvent firm made an assignment of their remaining property under the statute of Illinois to the defendants, Jack and Puterbaugh, for the benefit of the rest of their creditors. The transfer to C. B. Day included the entire assets of the firm, except some bills receivable, the face value of which was $40,000, but the actual value of which was less than $20,000.

The bill avers that, in order to evade the statute of Illinois governing assignments by insolvent debtors and prohibiting preferences, it was agreed between the firm and Charles B. Day that the former should by a bill of sale transfer to the latter their entire stock of goods by way of preference over the other creditors.

The bill also alleges that Jack and Puterbaugh, the assignees, have neglected to take any measure, for the recovery of the property transferred to C. B. Day, and that they do not intend to impeach the transaction between him and the assignors. The complainants, who have a claim against the insolvent estate amounting to $7,700, bring the suit to recover the property transferred to C. B. Day and have the proceeds thereof equally divided among all the creditors.

In disposing of the demurrer Judge Gresham stated that if it was true that the insolvent firm had determined to make an assignment under the State law, and that C. B. Day knew of the insolvency and of this determination, and for the purpose of
24 evading the provisions of the law and preferring C. B. Day, it was agreed that the transfer should be made to him first in pretended payment of his debt, and that a formal assignment should be made subsequently, such a palpable evasion of the statute might not be sustained, but that question is not presented for decision.

It is clear that no suit can be brought by the creditors against the assignees and Day until a demand has been made upon the assignees to sue and they have refused to do so.

The bill does not allege that before this suit was brought the creditors requested the assignees to sue and they refused to comply. The assignees are the proper parties to bring all suits to recover property belonging to the estate.

Without expressing an opinion upon any of the other questions presented by the demurrer, it was sustained solely on the ground that the suit was brought by a creditor without a demand being first made upon the assignees to bring the suit.

Endorsed: Filed Feb'y 16, 1885. Wm. H. Bradley, cl'k.

25 On the same day, to wit, on the sixteenth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GEORGE C. RICHARDSON *et al.*
vs.
CHARLES B. DAY *et al.*
} In Chancery.

The parties herein, by their solicitors, now come into court, and the court having considered the defendants' demurrer to the bill herein, sustains the same and grants leave to the complainants to amend their bill.

Afterwards, to wit, on the eleventh day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Decree.

GEORGE C. RICHARDSON, GEORGE K. GUILD, HARRISON GARDNER, CHARLES S. SMITH, WALTER M. SMITH, and RALPH L. CUTTER,
26 *vs.*
CHARLES B. DAY, WILLIAM JACK, and LESLIE D. PUTERBAUGH.
} In Chancery.

Now come again the parties herein, by their solicitors, and it appearing to the court that the complainants decline to amend their bill herein in pursuance of the permission of the court to do so heretofore granted, and the defendants' demurrer to the complainants' original bill having been heard and sustained by the court, it is thereupon ordered, adjudged, and decreed that the bill of complaint herein be, and the same is hereby, dismissed at complainants' costs for want of equity, and that execution issue.

And thereupon come the complainants, by their solicitor, and pray an appeal herefrom to the Supreme Court of the United States, which is allowed, upon the complainants giving a bond in the penal sum of five hundred dollars, with surety to be approved by the court, and said complainants are allowed twenty days in which to file such bond.

27 Afterwards, to wit, on the tenth day of April, 1885, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, George C. Richardson, George K. Guild, and Harrison Gardner, of the city of Boston, county of Suffolk, and State of Massachusetts, and Charles S. Smith, of the city, county, and State of New York, and Ralph L. Cutter, of the city of Brooklyn, county of Kings, and State of New York, and

Walter M. Smith, of Stamford, county of Fairfield, and State of Connecticut, as principals, and C. B. Farwell, of the city of Chicago, county of Cook, and State of Illinois, as surety, are held and firmly bound unto Charles B. Day, William Jack, and Leslie D. Puterbaugh, all of the city of Peoria, in the State of Illinois, in the penal sum of five hundred dollars (500), lawful money of the United States; for the payment of which sum, to be made well and truly, we bind ourselves, our heirs, executors, and administrators and successors, jointly and severally, firmly by these presents.

Witness our hands and seals this second day of April, 1885.

The condition of the above obligation is such that whereas in a certain cause then pending in the circuit court of the United States in and for the northern district of Illinois, in chancery,
28 wherein George C. Richardson, George K. Guild, Harrison Gardner, Charles S. Smith, Walter M. Smith, and Ralph L. Cutter were complainants and Charles B. Day, William Jack, and Leslie D. Puterbaugh were defendants, there was made and entered of record in said cause, on the sixteenth day of February, 1885, an order of said court sustaining the demurrer of said defendants to the bill of complaint of said complainants for want of equity, and rendering judgment against the said complainants for the costs of said suit, from which said judgment of the said circuit court the said complainants, George C. Richardson, George K. Guild, Harrison Gardner, Charles S. Smith, Walter M. Smith, and Ralph L. Cutter, prayed for and obtained an appeal to the Supreme Court of the United States: Now, therefore, if the said George C. Richardson, George K. Guild, Harrison Gardner, Charles S. Smith, Walter M. Smith, and Ralph L. Cutter shall duly prosecute their said appeal with effect, and, moreover, pay the amount of the judgment, costs, and damages rendered and to be rendered against them in case the said judgment and order shall be affirmed in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

GEO. C. RICHARDSON. [SEAL.]
GEO. K. GUILD. [SEAL.]
HARRISON GARDNER. [SEAL.]
CHAS. S. SMITH. [SEAL.]
RALPH L. CUTTER. [SEAL.]
29 WALTER M. SMITH. [SEAL.]
C. B. FARWELL. [SEAL.]

FRANK C. SNIFFEN.
Witness for Geo. C. Richardson, Geo. K. Guild, Charles S. Smith, Ralph L. Cutter, Walter M. Smith.

W. F. GAVETT,
Witness for Harrison Gardner.

Approved:

W. Q. GRESHAM,
Circuit Judge.

Endorsed: Filed April 10, 1885. Wm. H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause, wherein George C. Richardson *et al.* are the complainants and Charles B. Day *et al.* are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-third day of April, 1885.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: N. Illinois C. C. U. S. No. 226. George C. Richardson, George K. Guild, Harrison Gardner, *et al.*, appellants, *vs.* Charles B. Day, William Jack, Leslie D. Puterbaugh. Filed May 8, 1885.

IN THE

SUPREME COURT OF UNITED STATES.

GEORGE C. RICHARDSON et al.,
Appellants,

vs.

CHARLES B. DAY et al.,
Respondents.

BRIEF FOR APPELLANTS.

TENNEY, BASHFORD & TENNEY,
Solicitors for Appellants.

JAMES M. FLOWER,
Of Counsel.

PRINTED BY
MORGAN O'BRIEN PRINTING HOUSE AND PUBLISHERS' PRINTERS, 152 E. JEFFERSON ST.
TELEPHONE 1260.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause, wherein George C. Richardson *et al.* are the complainants and Charles B. Day *et al.* are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-third day of April, 1885.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: N. Illinois C. C. U. S. No. 226. George C. Richardson, George K. Guild, Harrison Gardner, *et al.*, appellants, *vs.* Charles B. Day, William Jack, Leslie D. Futerbaugh. Filed May 8, 1885.

IN THE

SUPREME COURT OF UNITED STATES.

GEORGE C. RICHARDSON et al.,
Appellants,

vs.

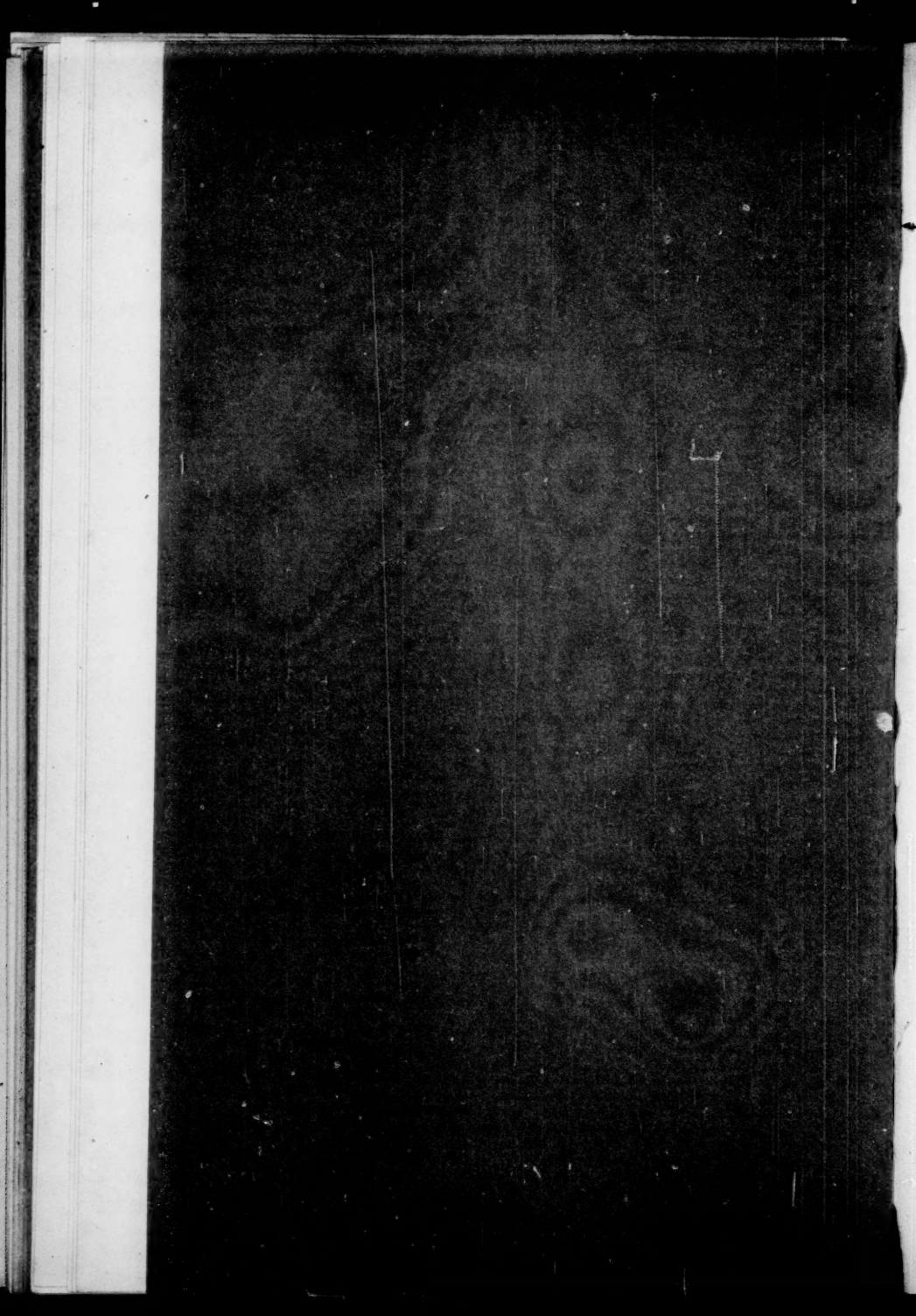
CHARLES B. DAY et al.,
Respondents.

BRIEF FOR APPELLANTS.

TENNEY, BASHFORD & TENNEY,
Solicitors for Appellants.

JAMES M. FLOWER,
Of Counsel.

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 192 S. JEFFERSON ST.
TELEPHONE 4880.



IN THE

SUPREME COURT OF THE UNITED STATES.

GEORGE C. RICHARDSON et al.,
Appellants,

vs.

CHARLES B. DAY et al.,
Respondents.

BRIEF FOR APPELLANTS.

This is an appeal from a decree sustaining a demurrer to appellants' bill in chancery, and dismissing the same upon the ground that the appellants had not shown themselves entitled to maintain the suit.

The appellants and complainants composed the firm of Geo. C. Richardson, Smith & Co., of New York City, and were non-residents of Illinois; the defendants were C. B. Day, a purchaser of the partnership property of Day Bros. & Co., of Peoria, Illinois, and William Jack

and Leslie D. Puterbaugh, the voluntary assignees of said firm.

After stating the citizenship of the parties, the bill alleges that in August, 1884, Day Bros. & Co. were indebted to complainants in the sum of $7,736 34, and that they were then doing business at Peoria as wholesale and retail dealers in dry goods, and so continued up to about September 28, 1884, at which time they had on hand merchandise of the value of about $300,000, and outstanding accounts, bills receivable, and other property, of the nominal value of $40,000. That the firm was then owing about the sum of $500,000, a large part of which was past due, and that it was then grossly insolvent. That said firm then owed to the defendant, Charles B. Day, who is a brother of Lucius L. Day, of said Day Bros. & Co., and was himself formerly a member of said firm, a large sum of money, and that said Charles B. Day was liable as indorser for said firm and otherwise, in all to the amount of about $200,000. That the insolvent condition of said Day Brothers & Co. was then well known by them and by the defendant, Charles B. Day, and that the firm must immediately fail and retire from business; wherefore it became and was their duty, under the laws of Illinois, to make a voluntary assignment of all their property for the equal benefit of all their creditors; and they then and there contemplated a final distribution of their property among their creditors in view of their insolvency and immediately impending failure. But, inasmuch as, by the laws of Illinois, preferences are not allowed under such assignments, it was determined and agreed between said firm and the defendant, Charles B. Day, that said laws should, if possible, be evaded by a pretended sale, and preference to him; that accordingly said Day Bros. & Co.

made a bill of sale and transferred to him on said 28th of September, 1884, all their merchandise and certain other property in pretended payment of their indebtedness to him and to secure him against liability which he was under for said firm, but really to give him a preference over their other creditors.

That the property so sold was of the value of about $300,000, and the debt intended to be preferred was about $200,000. That the property was immediately delivered over to said defendant, and said firm ceased to do business, as such, leaving nothing in their hands or subject to their control, except a lot of slow accounts and bills receivable, and some other odds and ends of assets accumulated by said firm, but of very little convertible value.

That on October 8, 1884, said Day Brothers & Co. made a general assignment of all their property for the benefit of creditors, to the defendants, William Jack and Leslie D. Puterbaugh, as assignees, but delivered over to them only such property as remained after the pretended sale to defendant, Charles B. Day, of the nominal value of $40,000, but actually worth less than half that sum.

That said Jack and Puterbaugh have qualified as such assignees, but that they make no claim to the property acquired by the defendant, Charles B. Day, in the manner aforesaid; and have neglected to take any necessary measures to recover the same or any part thereof, and do not intend to move at all in the matter, pretending to believe the transfer to Charles B. Day, unimpeachable by them.

That in the schedules accompanying said assignment the complainants are named as creditors to the amount of their claim, as hereinbefore stated, and that they have proved and filed their claim as required by law, and are beneficiaries in the trust created by said assignment.

That the bill of sale and transfer of the assets of Day Brothers & Co. to the defendant, Charles B. Day, and the voluntary assignment to the defendants, Jack & Puterbaugh, are parts of a single transaction, and the same constitute an assignment with preferences, which preferences are unlawful, and that the property transferred to Charles B. Day inures to the benefit of all creditors of said firm, by virtue of said instruments, and the same should be accounted for and administered as a part of the estate of said insolvents by said assignees, or a receiver appointed by this court for that purpose. *That said assignees, having been appointed by said insolvents, are subservient as far as possible to the purposes of the latter, and, being desirous that said Charles B. Day shall retain the preference by him attempted to be acquired, have not undertaken, and will not willingly undertake, any measure to defeat the same, or to recover said property for the benefit of the complainants and other creditors in whose interest this bill is filed.* That the appointment of a receiver by this court is therefore necessary to recover said property, and administer said estate in the interest of all creditors.

The relief asked is that the bill of sale by Day Bros. & Co. to C. B. Day, and the voluntary assignment to Jack and Puterbaugh, be construed together, and decreed to be parts of the same transaction, and to constitute a voluntary assignment for the benefit of creditors with preferences; that the preferences be decreed to be void; that a receiver be appointed to take possession of the property remaining of that so transferred to C. B. Day; and that he be required to account for so much thereof as he may have sold in the meantime; and that the receiver proceed to collect and convert the property so turned over to him, and to hold the same subject to the further decree of

the court for the equal benefit of all the creditors of Day Bros. & Co. without preferences, and for such other relief as may be agreeable to equity.

The bill was filed on behalf of complainants and all other creditors of Day Bros. & Co., similarly situated, who might come in and be made parties.

The decision of Judge GRESHAM, sustaining the demurrer to the bill in this case, will be found reported in 23 Federal Reporter, p. 227. After setting forth the allegations of the bill, he says:

" If it was true that the insolvent firm had determined " to make an assignment under the State law, and that C. B. " Day knew of the insolvency and of this disposition, and, " for the purpose of evading the provisions of the law and " preferring C. B. Day, it was agreed that the transfer " should be made to him first in pretended payment of his " debt, and that a formal assignment should be made subse- " quently, such a palpable evasion of the statute might not " be sustained. But that question is not presented for " decision. It is clear that no suit can be brought by the " creditors against the assignees and Day until a demand " has been made upon the assignees to sue, and they have " refused to do so. The bill does not allege that before this " suit was brought the creditors requested the assignees to " sue, and they refused to comply. The assignees are the " proper parties to bring all suits to recover property belong- " ing to the estate."

Without expressing an opinion upon any of the other questions presented by the demurrer, it was sustained solely on the ground that the suit was brought by a creditor without a demand being first made upon the assignees to bring the suit.

The Circuit Court erred in sustaining the demurrer and dismissing the bill.

ARGUMENT.

The repeal of the Federal Bankrupt Act has prompted legislation in most of the States, regulating the voluntary assignment of property by an insolvent debtor for the benefit of his creditors. These enactments generally provide for the execution and record of the deed; for the filing of schedules of the property and lists of creditors; for the appointment of an assignee, his bond and duties; for the proof of claims, and for the administration of the trust estate by a court of record. Preferences, which were recognized at common law, but which were always obnoxious to the courts, have been prohibited by many of the legislatures, some statutes avoiding the assignment containing the preference, while others set aside the preference only, and distribute the estate assigned for the equal benefit of all the creditors. Many devices have been invented, and many schemes resorted to by failing debtors, to defeat the salutary provisions of the law, as shown by the reports of the State courts, which record the attempts of the failing debtor to prefer confidential debts to relatives and friends, by bill of sale, chattel mortgage, confession of judgment, or other transfer, just before the execution of the general assignment.

The courts have, however, with great unanimity, treated the statute as remedial in character, and to be liberally construed to prevent the mischief it was designed to correct.

Assignments for the benefit of creditors in the State of Illinois are regulated by the act of May 22, 1877 (1 Starr & Curtis An. Stat. of Ill., p. 1303), and the rights of the parties to this suit depend largely upon the construction of that statute.

The record here presents two questions: First—Do the bill of sale to C. B. Day and the general assignment for the benefit of creditors constitute a single transaction? Second—If so, can a creditor maintain a suit in equity to set aside the bill of sale as preferential, and to enforce the trust for the equal benefit of all the creditors? Before proceeding to the argument under these separate heads, we shall present a summary of the provisions of the Illinois statute, setting out verbatim the sections of the statute that bear directly upon either point.

SECTION 1. "Be it enacted, etc. That in all cases "of voluntary assignments hereafter made for the benefit "of creditor or creditors, the debtor or debtors shall annex "to such assignment an inventory, under oath or affirma- "tion, of his, her or their estate, real and personal, "according to the best of his, her or their knowledge; "and also a list of his, her or their creditors, their resi- "dence and place of business if known, and the amount "of their respective demands; but such inventory shall "not be conclusive as to the amount of the debtor's estate, "but such assignment shall vest in the assignee or assignees "the title to any other property, not exempt by law, "belonging to the debtor or debtors at the time of making "the assignment, and comprehended within the general "terms of the same. Every assignment shall be duly "acknowledged and recorded in the county where the "person or persons making the same reside, or where the "business in respect of which the same is made has been "carried on; and in case said assignment shall embrace "lands, or any interest therein, then the same shall also be "recorded in the county or counties in which said land "may be situated."

Section 2 provides for giving notice of the assignment to creditors.

Section 3 requires the assignee to file an inventory with the clerk of the County Court, and to give bond for the faithful discharge of his duties.

Section 4 requires the assignee to file with the clerk of the County Court, at the expiration of three months, a list of creditors who have proved their claims, with the amount thereof, and their place of residence.

Section 5 relates to contesting claims against the insolvent estate in the County Court.

SECTION 6. "That at the first term of the said county "court, after the expiration of the three months, as afore- "said, should no exception be made to the claim of any "creditor, or if exceptions have been made, and the same "have been adjudicated and settled by the court, the said "court shall order the assignee or assignees to make, from "time to time, fair and equal dividends (among the credit- "ors) of the assets in his or their hands, in proportion to "their claims, and as soon as may be, and within one year "thereafter, to render a final account of said trust to said "county court, and said court may allow such commissions "and allowances to said assignee or assignees in the final "settlement, as may be considered by the court to be just "and right. Provided, however, that all claims for the "wages of any laborer or servant, which have been earned "within the term of three months next preceding the mak- "ing of such assignment, and which have been filed within "said term of three months after such assignment, and to "which no exception has been made, or to which excep- "tions have been made, and the same have been adjudicated "and settled by the court, shall, after the payment of the "costs, commissions and expenses of the assignment, be "preferred and first paid, to the exclusion of all other "demands and claims. Provided, further, that such claims "for wages of any laborer or servant shall recite upon their "face that they are for such wages, and, when exceptions "are taken to such claims, the said court, in adjudicating "and settling the same, shall find that the claim so adjudi- "cated and settled is for wages of such laborer or servant.

SECTION 7. "That the assignee or assignees, in the "execution of assignments, shall at all times be subject to "the order and supervision of the County Court when in "session, or the judge of said court, when not in session;

" and the said court or the said judge may, by citation and " attachment, compel the assignee or assignees from time to " time to file reports of his or their proceedings, and of the " situation and condition of the trust; and to proceed in the " faithful execution of the duties required by this act, and " to obey the order of such court when in session, or the " said judge when not in session, in relation to the complete " and final settlement, distribution and paying over of the " proceeds derived from said trust or any part thereof, until " a final settlement and distribution is made."

Section 8 provides that a failure to file the inventory and list of creditors shall not avoid the assignment, but that the County Court may compel the debtor to submit to an examination in respect to his creditors and his property, " and may compel the delivery to the assignee or " assignees of any property or estate embraced in the " assignment."

Section 9 requires the assignee to file an additional inventory of any property which may come to his hands under said assignment after the filing of the first inventory.

Section 10 provides for the filing of claims to become due, and the adjustment of interest, and postpones the payment of claims that are not proved within three months.

SECTION 11. " That any assignee or assignees, as " aforesaid, shall have as full power and authority to dispose " of all estate, real and personal assigned, as the debtor or " debtors had at the time of the assignment, and to sue for " and recover in the name of such assignee or assignees " everything belonging or appertaining to said estate, real " or personal, and generally to act and do whatsoever the " said debtor or debtors might have done in the premises; " but no sale of any real estate belonging to said trust shall " be made only on notice published, as in case of sales of " real estate on execution, unless the County Court shall " order and direct otherwise."

Section 12 provides for the appointment of a successor in case the assignee is removed or fails to act.

SECTION 13. "Every provision in any assignment "hereafter made in this State, providing for the payment of "one debt or liability in preference to another, shall be void, "and all debts and liabilities within the provisions of the "assignment shall be paid *pro rata* from the assets thereof."

SECTION 14. "Full authority and jurisdiction is "hereby conferred upon county courts, and the judges "thereof, to execute and carry out the provisions of this "act, and said courts shall be and remain open at all times "for the transaction of business under this act."

Section 15 relates to the discontinuance of proceedings.

There is no other legislation in Illinois bearing upon the subject of voluntary assignments for creditors.

I.

The bill of sale to Charles B. Day, made, with his knowledge, for the purpose of evading the law, by Day Bros. & Co., after they had formed the determination to make a general assignment, must be treated as a part of the deed which was executed ten days later, and the illegal preference must be set aside, and the entire estate of the insolvent debtors must be administered for the equal benefit of all their creditors.

The provisions of the Illinois statute are plain, and they should not be defeated by any narrow interpretation. Prior to this enactment preferences in voluntary assignments were upheld by the courts of Illinois (*Cooper* v. *McClure*, 16 Ill. 435), and it was the legislative purpose to prevent an unequal distribution of the estates of insolvent debtors when making a final distribution of all of their property.

Since the decision of this cause in the Circuit Court, the Supreme Court of Illinois has had the assignment act under consideration, and has placed upon the statute the construction contended for by us. Every question that can be raised upon this appeal was there fully met by the court. We shall therefore quote somewhat at length from the opinion as part of this argument.

The case is, *Preston* v. *Spaulding*, 120 Ill. 208. There the failing debtors, after they had formed the determination to make a general assignment, transferred part of their property to certain creditors, and confessed judgments in favor of certain other creditors, for the purpose of giving preferences, and then executed the deed of assignment for the benefit of all the remaining creditors. The court held that the several acts constituted but one transaction, which was construed to be a voluntary assignment with preferences; that the preferences must be set aside and the estate distributed equally among all the creditors, and that a suit for that purpose might be maintained by a general creditor in a Court of Equity. The court say (p. 217):

"The statute is silent as to the form of the instru-
"ment or instruments, by which an insolvent debtor may
"effect an assignment. The declaration of assignment,
"which is to evidence the intention to make a voluntary
"assignment, must, it would seem, be in writing, for it
"must be acknowledged and recorded in the county, and
"have annexed a verified inventory of the estate, and a
"list of creditors, etc.; but an incorrect inventory and
"list in no way affects the validity of the assignment, nor
"is the inventory conclusive as to the amount of the
"debtor's estate, but the assignment shall vest in the
"assignee * * * the title to any other prop-
"erty, not exempt by law, belonging to the debtor * *

" at the time of making the assignment, and comprehended " within the general terms of the same. It is not con- " tended, that here, in the single instrument declaring the " debtors' intention to make a voluntary assignment of all " their estate for the benefit of creditors, and which they " acknowledged and recorded, an express preference was " made in favor of the judgment creditors, so that, if we " are to be confined to the express provisions of that " writing, the question would have to be resolved in the " negative. If, then, these preferences are to be held to " be within the 'provisions' of the assignment, or 'com- " prehended within its general terms,' it must be because " they fall within the intent and spirit of the act.

" It will be observed, this act does not assume to " interfere, in the slightest degree, with the action of a " debtor while he retains the dominion of his property. " Notwithstanding this act, he may now, as heretofore, in " good faith sell his property, mortgage or pledge it to " secure a *bona-fide* debt, or create a lien upon it by opera- " tion of law, as by confessing a judgment in favor of a " *bona-fide* creditor. But when he reaches the point where " he is ready and determines to yield the dominion of his " property, and makes an assignment for the benefit of his " creditors, under the statute, this act declares that the effect " of such assignment shall be the surrender and conveyance " of all his estate, not exempt by law, to his assignee, ren- " dering void all preferences, and bringing about the distri- " bution of his whole estate, equally, among his *bona-fide* " creditors; and we hold that it is within the spirit and intent " of the statute that, when the debtor has formed a deter- " mination to voluntarily dispose of his whole estate, and " has entered upon that determination, it is immaterial into " how many parts the performance or execution of his

" determination may be broken, the law will regard all his " acts having for their object and effect the disposition of " his estate as parts of a single transaction; and, on the " execution of the formal assignment, it will, under the " statute, draw to it, and the law will regard as embraced " within its provisions, all prior acts of the debtor having " for their object and purpose the voluntary transfer or " disposition of his estate to or for creditors; and, if any " preferences are shown to have been made or given by " the debtor to one creditor over another in such disposi- " tion of his estate, full effect will be given the assignment, " and such preferences will in a court of equity be declared " void, and set aside as in fraud of the statute.

" The application of the law, as thus interpreted, " to the facts of the case, is not difficult. The debtors, " conscious of their hopeless insolvency, and determined to " make disposition of their whole estate to and for their " creditors, entered upon the execution and performance " thereof. Claiming to be indebted to some of their im- " mediate relatives, they made preferential payments and " conveyances of real estate directly to such relatives in " satisfaction of such alleged indebtedness; and then, with " one hand, they proceed to make and deliver a series of " judgment notes, for the avowed purpose of preferring " certain of their creditors, among whom were appellants, " and, with the other hand, made a deed of assignment " for the benefit of creditors generally in form free from " legal defect. Both these operations, the making and de- " livering of the judgment notes and the preparation of the " deed of assignment, are shown to have been carried on " at one and the same time by different members of the " debtor firm; but so skillfully timed were these different " steps, that the favored creditors had just sufficient time

" to take their judgment notes into the different courts in " Chicago, and there have judgments entered thereon, and " execution issued and placed in the hands of the execut- " ing officers, to perfect a lien upon personal property of " the debtors, before the deed of assignment was placed " on file; and then, before the assignee could qualify, and " take possession of the assigned estate, the officers holding " the execution took the great bulk of the debtors' estate " into possession.

" It will be observed that all this was strictly in accord- " ance with the forms of law; but will any one deny that a " most palpable fraud was, in fact, perpetrated upon appel- " lee, Spaulding, by the debtors, or that the acts of the " debtors were in fraud of the statute? The one article of " lumber in the possession of the debtors at the moment " the preferential judgments were rendered, according to " the debtor's own estimate, was worth, or perhaps had " cost, $125,000, and every foot of this lumber had been " sold and delivered to them by Spaulding; and yet, if " these judgments are to stand, he can reach no foot of it. " But if this fact be pressed aside, can it be possible that " insolvent debtors, under such circumstances, can, by any " act or acts of theirs, render wholly nugatory and inop- " erative this statute guaranteeing equality among cred- " itors? Most certainly not. This voluntary assignment " act is, in its character, remedial, and must, therefore, " be liberally construed, and no insolvent debtor, having in " view the disposition of his estate, can be permitted to " defeat its operation by effecting unequal distribution of " his estate by means of an assignment, and any other " shift or artifice under the forms of law; and, whatever " obstacles might be encountered in other courts of this " State (and of this we shall speak hereafter), a court of

" equity, when properly invoked, was bound to look through " and beyond the form, and have regard to the substance, " and, having done so, to find and declare these preferen- " tial judgments void, under the statute, and to set them " aside.

" But it is said, that, although the action of the debtors " in giving the judgment notes, and thus placing appellants " in a position to acquire a preference over other creditors, " may have been in fraud of the Voluntary Assignment " Act, the appellants themselves are guiltless of any wrong, " and having, without any evil intent or wrong-doing, and " without violating any moral obligation or broken any " law, been placed in a favored position, they ought, in " good conscience, to be left where the law finds them. " To this it must be answered, that, while the law favors " the diligent creditor, the favored position in which " appellants were placed was the result of no diligence on " their part. If Hair & Odiorne were insolvent, and con- " templated assignment, appellants were ignorant of it. " The original (as distinguished from the judgment) notes, " held by appellants, were not yet due, and it is not shown " that any one of appellants was at all apprehensive that " the notes they held would not be paid as they should " mature. They were not in a position to demand payment " of their notes, and no one of them had even asked " security. The change, then, in the position of appellants, " was brought about by the debtors alone. Without dis- " closing to appellants their object or intention, the debtors, " of their own volition, prepared a series of notes, corre- " sponding in date and amount with the notes already held " by appellants, and attached thereto warrants of attorney, " authorizing immediate judgment; and these notes were " presented and accepted by appellants. It is a misappre-

" hension to suppose that this Voluntary Assignment Act " attempts to regulate the conduct of creditors. What it " does, is to regulate the conduct of the debtor, and " declare void preferences made or given by him in an " assignment of his estate.

" The principles here announced find support in the " following authorities: In *Berry* v. *Cutts*, 42 Maine, 445, " the statute provides that assignments made by debtors " for the benefit of creditors should provide for an equal " distribution of all their estate among such of their " creditors, as, after notice, became parties to the assign- " ment, in proportion to the amount of their respective " claims. An insolvent debtor made mortgages of portions " of his property to particular creditors, and within two " days executed a voluntary assignment. In construing " this statute, it was said: 'When, therefore, a debtor, in " contemplation of an assignment under this act, shall " determine upon a distribution of his estate among his " creditors, and in execution of such contemplated assign- " ment and determination, and for the purpose of giving " a preference to one class of creditors over another class, " shall transfer to such preferred class a distinct portion of " his estate, and then assign the residue thereof to his " general creditors, though the different instruments may " not bear the same date or be executed at the same point " of time, if they are executed in pursuance of an original " design, contemplated and determined upon in the begin- " ning, they will be deemed in law one transaction—a " transaction consisting of a series of acts intended to pro- " duce one result, to wit, the distribution of the debtor's " estate among his creditors. If, therefore, the trans- " action, when fully executed as originally contemplated " and determined upon, does not make an equal distribu-

" tion of such estate among all creditors, in proportion to " their claims, it is not in conformity with the statute, and " must be deemed in fraud of its provisions.'

" In *Holt* v. *Bancroft*, 30 Ala. 193, the statute was: " 'Every general assignment made by a debtor, by which " a preference of priority of payment is given to one or " more creditors over the remaining creditors of the grantor, " shall be and inure to the benefit of all the creditors of the " grantor equally.' A mercantile firm, being insolvent, " made a deed of trust on May 9, on one-third of their " stock, to secure one of their creditors. At the time they " intended to make a general assignment of all their effects " for the benefit of their creditors, and so informed the " trustee, but not *cestui que trust*. May 17, they conveyed " the residue of their effects to another trustee for the bene- " fit of all creditors. Bill was filed by a creditor, alleging " the first deed a preference, and part and parcel of the " second, and therefore void. The second deed was con- " ceded, on argument, to be, in effect, a general assign- " ment. The court said: 'The object of the statute was " to prohibit all discrimination by a debtor, making a gen- " eral assignment, in favor of any of his creditors. * * " It is evident that if a party, having determined to make " a general assignment of all his property, can anticipate " by making partial assignments for the benefit of partic- " ular friends, the law can be effectually set at defiance, " and might as well never have been enacted. Its policy " of preventing preferences in general assignments would " be incapable of accomplishment, and the statute itself, " inviting to its evasion by the facility of accomplishing the " object, would be a dead letter. In truth, if one, intend- " ing to make a conveyance of all his property for the " benefit of his creditors, convey a part one day, a part

" the next, and so proceed until all his property is appro-
" priated according to the original intention, precisely the
" same end is accomplished as if a general assignment had
" been made at the outset; and the law must visit the same
" penalty upon preferences in an assignment accomplished
" by these successive acts as if it had been done by a single
" deed.' "

Other cases are cited and commented on by the Illinois Supreme Court in the opinion which will be referred to hereafter.

This doctrine is approved in Burrill on Assignments (5th ed.) page 184, where reference is made to *Downing* v. *Kintzing*, 2 Serg. and R. 326, 335. In that case two assignments were made to different persons by an insolvent debtor, with an interval of thirty-one days between them, and together conveying the whole of a debtor's estate; the object being to evade the act of Congress giving a priority to the United States. It was contended that the two deeds were to be construed separately; but the court held otherwise, and that taken together they constituted but one transaction, and that a general assignment, and so coming within the act. Reference is there made also to *United States* v. *Bank of United States*, 8 Rob. (La.) 262, where three partial assignments had been made by the bank, dated June 7 and September 4 and 6, 1841, and they were all construed together as constituting but a single transaction. The rule, as stated and approved by the learned author, is: " That, no matter how many instruments are employed to
" effect the same result, they all partake of the same char-
" acter, and all should be considered as parts of the same
" whole. If the same causes which led to the execution
" of one of the instruments, partial when considered alone,
" continue to operate until every particle of the debtor's

" property is diverted, the first instrument is to be coupled " with those that follow, and the whole should be construed " together."

Since the decision of this case by the Circuit Court, it has been called upon to construe the assignment act of Indiana, which also prohibits preferences. (*Woonsocket Rubber Co* v. *Falley*, 30 Fed. Rep. 808.) The opinion is by Judge GRESHAM, and it is there held that a certain conveyance in trust of the property of an insolvent copartnership, for the purpose of paying a part only of the creditors, constituted a voluntary assignment, and that upon a bill filed by a general creditor a court of equity might take possession of the property and administer the insolvent estate for the benefit of all the creditors. The transfer was not intended as a voluntary assignment by the debtors, but such was construed to be its legal effect, and it was enforced as such by the court.

The United States Circuit Courts have uniformly held to the same doctrine in the construction of the statutes of other States regulating assignments and prohibiting preferences. *United States* v. *Griswold*, 8 Fed. Rep. 496 (pp. 500, 502), is one of the earliest reported. There Judges SAWYER and DEADY held that several judgments confessed by an insolvent debtor were in effect a voluntary assignment, so as to entitle the United States to a priority in payment under section 3466, R. S. U. S.

Martin v. *Hausman*, 14 Fed. Rep. 160, construes the Missouri statute which prohibits preferences. There a chattel mortgage covering all the debtor's property to secure certain creditors therein named was held to be a general assignment. , The same statute was under consideration in *Daulman* v. *Jacobs*, 15 Fed. Rep. 863, same case, 16 Fed. Rep. 614, where a chattel mortgage cover-

ing all the debtor's property to secure a single creditor was construed to be a general assignment. The foregoing decisions have been followed and approved by Judges McCrary, Brewer, Krekel and Treat, in *Kellog* v. *Richardson*, 19 Fed. Rep. 70; *Clapp* v. *Dittman*, 21 Fed. Rep. 15; *Kerbs* v. *Ewing*, 22 Fed. Rep. 693; *Freund* v. *Yaegerman*, 26 Fed. Rep. 812; *Feldkamp* v. *Morse*, 27 Fed. Rep. 261.

Doggett v. *Hermann*, 16 Fed. Rep. 812, is a decision by Judge McCrary construing the Colorado statute which prohibits preferences. Several conveyances executed prior to a general assignment were construed as parts of one transaction, and void as in contravention of the statute.

Kellogg v. *Root*, 23 Fed. 525, is a decision by Judge Withey construing the Michigan statute which prohibits preferences. In that case two chattel mortgages executed March 10, 1884, were held to be a part of a general assignment executed March 17, 1884, and were set aside as preferential.

Bock v. *Perkins*, 28 Fed. Rep. 123, is a decision by Judge Brewer, in which Judges Love and Shiras concur, construing a similar statute in Iowa. There three instruments executed about the same time as an assignment, were construed as parts of the same transaction. The court there say (p. 126): "Where a party becomes conscious "of his insolvency—of his inability to pay all his creditors "in full--and has in contemplation the disposition of his "property, and in pursuance of that purpose makes to-day "a deed and to-morrow an assignment, they are to be "treated as part and parcel of the same transaction, and "that notwithstanding he may not at the time of the deed "have determined upon the assignment as the ultimate "act."

To the same effect is *Hahn* v. *Salmon*, 20 Fed. Rep. 801, where the Oregon statute was under consideration. The opinion is by Judge Deady.

The highest courts of the several States have, with great uniformity, placed a like interpretation upon the statutes prohibiting preferences.

The Supreme Court of Alabama has followed *Holt* v. *Bancroft*, 30 Ala. 193 supra, in the following cases: *Warren* v. *Lee*, 32 id. 440; *Crawford* v. *Kirksey*, 50 id. 590; *Shirley* v. *Teal*, 67 id. 449; *Danner* v. *Brewer*, 69 id. 191.

Connecticut and Delaware have similar statutes which have received a like construction by the courts of those States. *Biers* v. *Lyon*, 21 Conn. 604; *Waters* v. *Conely*, 3 Harring. 117; *Tunnell* v. *Jefferson*, 5 id. 206; *Wharton* v. *Clements*, 3 Del. Ch. 209.

The Iowa, Indiana and Michigan statutes have already been referred to in the decisions of the Federal Courts, and the following decisions by the Supreme Courts of those States are in line with the authorities already cited: *Burrows* v. *Lehndorf*, 8 Clark (Ia.) 96; *Cole* v. *Deilhan*, 13 (Ia.), 551; *Van Patten* v. *Burr*, 52 id. 448; *Van Horn* v. *Smith*, 59 id. 142; *Grubb* v. *Morris*, 103 Ind. 166; *Henderson* v. *Pierce* (Ind.), 9 N. E. R. 449; *Heinman* v. *Hart* (Mich.), 20 N. W. R. 792; *Cron* v. *Cron*, 22 id. 94.

The Kentucky statute prohibits preferences, and it has been liberally construed to accomplish that object. *Taylor* v. *Taylor*, 78 Ky. 470; *Whitaker* v. *Garnett*, 3 Bushnell, 402.

As early as 1836, Massachusetts, by statute, prohibited preferences in voluntary assignments, and the courts have so carried out its provisions as to insure an equal distribution of the entire property of an insolvent debtor among his creditors, regardless of the number of

instruments that may have been employed in making a final disposition of the estate. *Perry* v. *Holden*, 22 Pick. 269; *Holmes* v. *Winchester*, 135 Mass. 299.

Nebraska and New Jersey have similar statutes, and the interpretations placed upon them by the courts of those States are in consonance with the decision already referred to. *Bonds* v. *Carter* Neb. 31, N. W. R. 381; *Livermore* v. *McNair*, 34 N. J. Eq. 478.

The Ohio statute most resembles that of Delaware and Kentucky, and it has received a similar construction. *Harkrader* v. *Lerley*, 4 Ohio St. 610; *Conrad* v. *Pancost*, 11 Ohio St. 685.

Pennsylvania, in 1843, enacted that all assignments of property in trust to prefer one or more creditors, shall inure to the benefit of all creditors in proportion to their respective demands. (Pur. Dig. 91.) The adjudications arising under this statute in the courts of that State are quite numerous and very instructive, and we shall therefore refer to the decisions at some length.

In *Kern* v. *Powell*, 98 Pa. St. 253, the act is cited and construed. There was first an assignment of certain property to the son, in trust, to pay a debt due the wife of the assignor. Ten days later there was a general assignment for the benefit of all the creditors. The court held the first assignment void, and that all the property passed by the second assignment to the trustees therein named for the benefit of all creditors. The court distinguish this case from *Chaffees* v. *Risk*, 12 Harris, 432. In *Chaffees* v. *Risk*, there was a transfer of property directly to certain creditors, and such transfer was not followed by a general assignment. Other creditors sought to reach the property by attachment, and, instead of asking the court to construe the conveyance as a general assignment for

the benefit of all the creditors, they asked to have it adjudged fraudulent and void. The transfer was upheld.

In *Englebert* v. *Blanjot*, 2 Wharton, 240, the debtor made a bill of sale to one creditor to pay himself and three others, which was not recorded as an assignment under the act of 1818. Thirty-eight days thereafter the debtor made an assignment under the insolvent laws. The first transfer was held to be a voluntary assignment for the benefit of creditors, and void for want of record, and that the property thereby conveyed passed to the trustees named in the second assignment. The opinion is by Chief Justice GIBSON. He says: "In the interpretation "of such a law, the spirit of the enactment is to be "extended to the cases within the mischief, though not "within the letter." He considered the statute not only as remedial but as greatly beneficial, and consequently to be liberally construed in suppression of the mischief. He would tolerate no narrow interpretation. "Subject to be thus parried," he says, "the provisions of the law would be of little worth."

Sumner's Appeal, 4 Harris 169, holds that judgments confessed to evade the act of 1843, concerning preferences in assignments, followed by a general assignment, are void as against other creditors, and are not entitled to preferences out of the proceeds of the sale of real estate, but are entitled only to a pro rata payment with the other debts of the debtor.

In *Worman* v. *Wolfersberger*, 7 Harris 59, it was held that the doctrine of Sumner's Appeal was to be applied only when there is an assignment for the benefit of creditors, and that it could not be applied so as to deprive a judgment creditor of his judgment which had been amicably obtained, and to give the preference to a

subsequent judgment obtained compulsorily. *Guy* v. *McIltree*, 26 Pa. St. 92, and *York Co. Bank* v. *Carter*, 38 Pa. St. 446, are of like character.

In *Watson* v. *Bagaley*, 12 Pa. St. 164, a letter of attorney to collect certain moneys and pay them to certain creditors in a prescribed order of preference, was held to be an assignment, and void under the act of 1843. Chief Justice GIBSON there says: "If, then, the letter of attorney and the acts done pursuant to it virtually constituted "an assignment, it was decisively within the power of the "statute to regulate transfers for the benefit of creditors; "else those statutes might be evaded, and the pernicious "power to prefer be retained by changing the form of the "instrument." See also *Fallon's Appeal*, 42 Pa. St. 235; *Miner's National Bank's Appeal*, 57 Pa. St. 193; *Wallace* v. *Wainwright*, 87 Pa. St. 263.

In *Miner's National Bank's Appeal*, the scope of the act of 1843 is discussed, and the court say (pp. 199, 200): "It is entitled 'an act to prevent preferences in assign-"ments,' and it is argued from the title that its intention "was only to forbid preferences expressed in the deed it-"self. But this is contrary to the public sentiment which "led to the proposal of the act, and to the plain intent "found upon its face. It would enable the debtor always "to prefer creditors simply by framing his deed to suit his "purpose. He has only thus to name those he "would prefer in the deed, and leave out all others; and, "indeed, under that construction of the law, I see nothing "to prevent his multiplying his deeds, and thereby to "divide his estate and graduate his preferences. All his "property could be assigned for the benefit of a favored "few, and they his nearest relatives. Such cannot be the "meaning of the law, but its true design is that when a

" debtor cannot go on in business, but finds he must stop, " his property shall be administered for the benefit of all " his creditors alike, on the principle that equality is " equity. * * * Inability to pay debts marks " the period when business must stop, and the assignment " at this time evinces the motive of the debtor to control " the actions of his creditors. He knows best the state of " his affairs and when he is likely to stop; and the law " intends, that on arriving at this point, he should not " anticipate the disclosure by placing his property in trust " for his favorites, and beyond the reach of others.

" The main question upon the construction of the act " has not been distinctly decided, so far as we know. " Expressions have been used indicating the impression " that particular judges supposed the act had reference " only to preferences expressed in the assignment, as in " Blakey's Appeal, 7 Barr. 449, and Lea's Appeal, 9 id. " 504. But, the point before us not being in the mind of " the court, dicta cannot prevail over what we believe to " be the true intent of the act of 1843."

The doctrine of this case is approved in *Wallace* v. *Wainwright*, and in each case a partial assignment for some of the creditors was held to be a general assignment, and void for failure to comply with the recording acts.

In *McClurg* v. *Lecky*, 3 Penn. 83, decided in 1831, a deed, bill of sale and agreement, all taken together, were held to constitute an assignment.

The Vermont statute prohibits preferences, and money paid to creditors by the assignor prior to the execution of the assignment may be recovered back for the benefit of the estate. (*Larkin* v. *Hapgood*, 56 Vt. 597.)

A very recent and instructive case upon this subject

is *Winner* v. *Hoyt*, 28 N. W. R. 380, a decision by the Supreme Court of Wisconsin construing the statute of that State, which prohibits preferences. It is in full accord with the authorities already cited, many of which are referred to in the opinion of the court.

II.

The Circuit Court, in the decision of this case, concedes that the bill of sale is part of the assignment, and that it ought to be set aside as preferential, but holds that a court of equity cannot grant the relief at the suit of a general creditor until a demand has been made upon the assignees to sue and they have refused. The assignees, Jack and Puterbaugh, are made parties defendant in the suit, and the bill alleges their *neglect and unwillingness to take any measures to recover the property conveyed by the bill of sale, and the belief on their part that the transfer was valid and unimpeachable by them.* These averments are sufficient to justify the suit by creditors to recover the trust property, if the assignees could, under any circumstances, or in any court, assail transfers made by the debtor prior to the execution of the assignment. *Preston* v. *Spalding*, 120 Ill. 215; *Woonsocket Rubber Co.* v. *Falley*, 30 Fed. Rep. 808.

In *Preston* v. *Spalding*, *supra*, the suit was by a creditor, and, while it was conceded in that case that the assignee might have brought the suit, the court say (p. 215):

"Upon his neglect or refusal to take proper proceed-
"ings to protect the trust estate, or, as in this case, to
"reduce it to posesssion and gain its control, the rights of
"the creditors to come into a court of equity to assert

"their rights and protect their interests, cannot be "denied."

In support of this proposition a number of cases are cited, and, among them, *Holt* v. *Bancroft*, 30 Ala. 193, and *Kellogg* v. *Root* 23 Fed. Rep. 525.

In *Holt* v. *Bancroft*, the objection was made that a bill of this character could not be filed by a general creditor for the execution of the trust; that the trustee was not therein charged with any negligence or misconduct or refusal to act. The court held that the preference created by a prior conveyance was void by sheer force of the statute when the general assignment was executed, that the creditors were by the assignment invested with a lien, and had, therefore, a right, to file the bill for the purpose of removing an obstacle in the way of the execution of the trust for their benefit. See also *Crawford* v. *Kirksey*, 50 (Ala.) 590.

Kellogg v. *Root*, *supra*, presents the same question, and it was held that a court of equity had jurisdiction at the suit of a general creditor to enforce the trust created by the deed of assignment, to set aside preferences and to administer the estate for the benefit of all the creditors. So far as the record discloses, there was no averment in the bill of the neglect or refusal of the assignee to act, though he was made a party defendant.

In *Woonsocket Rubber Co.* v. *Falley*, *supra*, the bill was filed by general creditors who were not preferred, against the debtors, the assignee and the preferred creditors, and it prayed a decree declaring that the assignment inured to the benefit of all the creditors, and setting aside the preferences, and making an equal distribution of the property. If the right of a general creditor to maintain such a suit was raised, it does not appear in the record,

and Judge GRESHAM does not refer to the subject in the opinion, but assumed jurisdiction and granted the relief asked, which was substantially the same as that prayed for in the bill before the court.

The assignees of Day Bros. & Co., if they had so desired, could not have brought this suit, or taken any other action or proceeding in any court to recover property conveyed by the debtors prior to the execution of the assignment.

That question was squarely presented in *Clapp* v. *Nordmyer*, 25 Fed. Rep. 71, and it is there held that where a debtor makes a general assignment for the benefit of his creditors, the assignee cannot challenge any previous disposition of his assignor's property unless expressly authorized by statute. Prior to the execution of the assignment the debtor had confessed judgment to certain favored creditors in order, as the bill alleged, to give a preference. Judge BREWER says (p. 73):

"The assignee cannot challenge these conveyances. "He cannot say they were fraudulent. He cannot recover "the property, and no remedy is afforded under the "assignment act to creditors. Their only remedy is in a "court of equity." To the same effect are the decisions of Judge SEAMAS, in *Rumsey* v. *Town*, 20 Fed. Rep. 558, and *Sandwich Mnfg. Co.* v. *Wright*, 22 Fed. Rep. 631.

The same construction has been placed upon the power of the assignee under the Illinois statute by the courts of that State in decisions reported since the case at bar was decided by the Circuit Court. *Colburn* v. *Shay*, 17 Bradw. 289; *Lund* v. *Bank*, 96 Ill. 181; *Bouton* v. *Dement* (Ill.), 14 N. E. R. 62.

In *Colburn* v. *Shay*, the court say (p. 293): "It seems "too clear to admit of controversy, that a voluntary

" assignment, executed in accordance with the provisions " of this statute, passes to the assignee the estate, real " and personal, belonging to the debtor at the time of its " execution, and nothing more. The assignment is volun- " tary, and is so denominated in the statute, and as such it " is the mere act of the debtor; and, as a legal consequence, " it passes only that over which the debtor, at the time, " has the power of disposition.

" Nor does the statute, in any of its provisions, assume " to deal with anything beyond that. The first section pro- " vides that the assignment shall vest in the assignee the " title to all the property of the debtor, not exempt " from execution, belonging to him at the time of its exe- " cution, if comprehended within the general terms of the " assignment, notwithstanding the omission of a part of it " from the inventory; but no attempt is made to include " property already disposed of by the debtor, although " such disposition, by reason of fraud, may, as to credit- " ors, be voidable, so as to leave the property still within " their reach and subject to their debts.

" The power given to the assignee, by the eleventh " section, is declared to be the same that the debtor had at " the time of the assignment; and farther on, so that no " doubt might arise from any general language employed, " it is again declared that the assignee shall have power, " generally, to act and do whatever the debtor might have " done in the premises."

Bouton v. *Dement* was decided by the Supreme Court of Illinois November 11, 1887, and in the opinion the court say: " The company, by its assignment, conveyed no " greater right in respect of its property than the company " itself possessed. It is the well settled rule that a general " assignment for the benefit of creditors does not pass to

" the assignee any interest in property before fraudulently " transferred by the assignor, nor any right to impeach or " set aside such fraudulent transfer, such right belonging " to the creditors alone. (*Brownell* v. *Curtis*, 10 Paige 210; *Leach* v. *Kelsey*, 7 Barb. 476; *Van Dyke* v. *Christ*, 7 Watts & S. 373; *Esterbrook* v. *Messersmith*, 18 Wis. 545; *Jones* v. *Yates*, 9 Barn. & C. 532, 17 E. C. L. 532.) " We do not perceive that our statute respecting assign- " ments makes any change of the rule. The assignee is " not the representative of creditors, but the agent of the " assignor for the distribution of the property assigned. " The assignee's duty, as said in *Lund* v. *Bank*, 96 Ill. 183, " 'is confined to the distribution of the proceeds of the " property assigned to him.' Any interest in property " before fraudulently transferred by the assignor was not " assigned to the assignee."

Strong v. *Goldman*, 8 Bissell, 552, is to the same effect. The opinion is by Hon. Henry W. Blodgett, and is entitled to great weight in the construction of the Illinois statute. He says (p. 554): " The question is made, " that inasmuch as the statute of Illinois passed in 1877, " regulating the method of executing assignments made " for the benefit of creditors, clothed the assignee with " power to execute the trust under the direction of the " county court, after having given bond approved by the " county judge, that a court of equity is from this time " forward deprived of the power to exercise the ordinary " jurisdiction, with which they have been heretofore " clothed, for entertaining creditors' bills and searching " out fraudulent conveyances to set them aside, and that " the whole subject matter of investigating the affairs of a " debtor who has seen fit to make an assignment is rele- " gated to the county court under the operation of this

"law. I cannot give any such scope to this statute regu-
"lating assignments. Undoubtedly the intention of the
"Illinois Legislature was, as far as possible, to give the
"aid of the county court to the execution of assignments;
"but it nowhere clothes the voluntary assignee with
"power to set aside a fraudulent assignment which
"the assignor has made, or any other fraudulent
"acts. It does not give him authority to set aside
"a preference which had been made even upon the very
"eve of the assignment. It simply declares that any
"preference made in the assignment itself shall be void.
"But suppose that a debtor, the very day that he makes
"his voluntary assignment to the assignee for the benefit
"of his creditors, takes all his ready money and pays cer-
"tain creditors in full, and then assigns the remnant of the
"estate for the benefit of his other creditors; there is no
"method by which the voluntary assignee can get behind
"his assignment; no method given by the statute by
"which he can get behind these preferences and set them
"aside, but he must simply step into the shoes of the
"debtor himself, and execute the assignment under the
"law, without the power to challenge or cause to be set
"aside any of the fraudulent transactions that the party
"may have been guilty of up to the very moment he made
"his assignment. This is no question of conflict of juris-
"diction between the County Court and this court; but it
"is a question whether the Legislature intended to clothe the
"County Court wholly with power of administering the af-
"fairs of a debtor who has made a voluntary assignment, so
"that creditors could not attack, except through the County
"Court and the assignee, a fraudulent assignment, or
"fraudulent actions and preferences consummated prior to
"the making of the assignment. I do not think there is

" any fair inference in the language of the law itself for " any such intention on the part of the Legislature. It is " not a question of conflict between the County Court of " Cook County and the Federal Court of this circuit, but " it is a question between the County Court and courts of " equity, and in that light, it seems to me, the inference " cannot be deduced that the Legislature intended to repeal " a portion of the chancery act of this State, which has " been in force over forty years, authorizing the filing of " creditors' bills, and the pursuit through the agency and " machinery of a court of equity of equitable assets, and " setting aside fraudulent conveyances. It did not intend " to denude courts of the power they have so long exer- " cised by the mere placing of voluntary assignees within " the control of some tribunal which could overlook and " control their transactions."

The foregoing decision is decisive of the questions raised upon this appeal, and it would doubtless have been followed by Judge GRESHAM, had it been called to his attention upon the argument.

It was insisted upon the argument in the court below that the County Court had exclusive jurisdiction of all suits and proceedings to recover possession of the property assigned, and to distribute the fund among creditors. The last decision cited fully meets that objection; but in this connection we cite the following authorities to the same effect: *Fleisher* v. *Greenwald*, 20 Fed. Rep. 547; *Clapp* v. *Dittman*, 21 Fed. Rep. 15; *Chapman* v. *Borer*, 1 McCrary, 49; *Hull* v. *Dills*, 19 Fed. Rep. 657; *Hagan* v. *Walker*, 14 Howard, 30; *Payne* v. *Hook*, 7 Wall. 425; *Hook* v. *Payne*, 14 Id. 252; *Yanley* v. *Lavender*, 21 Wall. 283; *Ellis* v. *Davis*, 109 U. S. 498; *Hess* v. *Reynolds*, 113 U. S. 73.

It was also urged in the court below, that there was a defect of parties, in that Day Bros. & Co., the debtors, were not made defendants. The assignors are not necessary parties to the suit to subject their property to the payment of their debts without preferences. The property sought to be affected has passed beyond their control, and they cannot be prejudiced in any legal sense by the decree prayed for in this bill. No relief is asked as against them. *Hickok* v. *Elliott*, 22 Fed Rep. 20, and cases there cited; *French* v. *Shoemaker*, 14 Wall. 314; *Williams* v. *Bankhead*, 19 Wall. 571, rule stated; *Fox* v. *Moyer*, 54 N. J. 130; *Buffington* v. *Harvey*, 95 U. S. 99, 102, 103; *Benton* v. *Allen*, 2 Fed. Rep. 448; *Clapp* v. *Dittman*, 21 Fed. Rep. 15; *Dahlman* v. *Jacobs*, 16 Fed. Rep. 614; *Martin* v. *Hausman*, 14 Fed. Rep. 160; *Smith* v. *Ashton*, 14 Neb. 426; *Holt* v. *Bancroft*, 30 Ala. 193; *Crawford* v. *Kirksey*, 50 Ala. 590; *Payne* v. *Hook*, 7 Wall. 425.

TENNEY, BASHFORD & TENNEY,
Solicitors for Appellants.

JAMES M. FLOWER,
Of Counsel.

FILED.
APR 3 1899
JAMES H. McKENNEY.

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE C. RICHARDSON et al.,
Appellants,

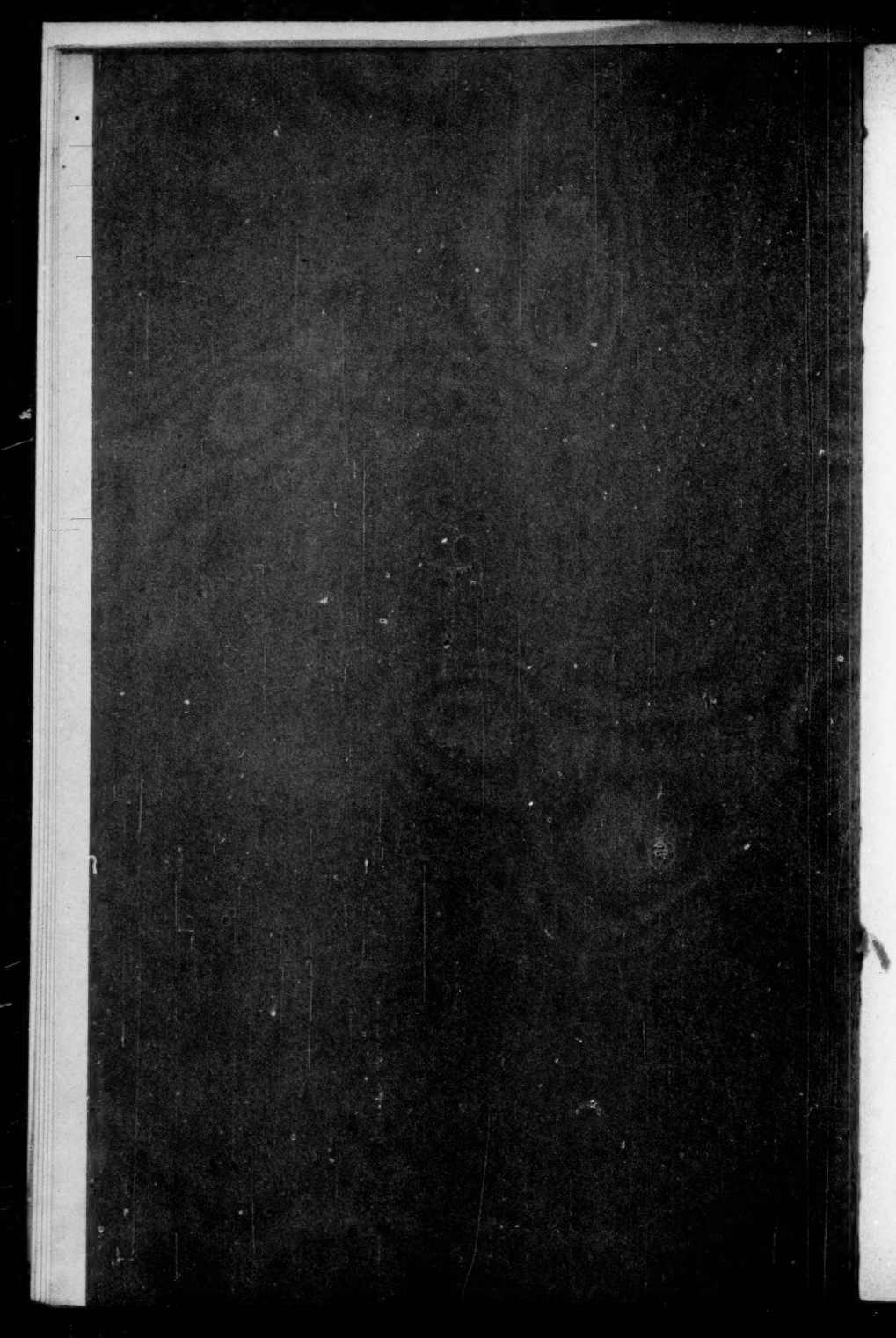
vs.

CHARLES B. DAY et al.,
Defendants.

BRIEF FOR APPELLEE.

PUTERBAUGH & PUTERBAUGH,
AND
HOPKINS & HAMMOND,
Solicitors.

EDWARD HINE & CO., PRINTERS, PEORIA, ILL.



IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE C. RICHARDSON et al.,
Appellants,

vs.

CHARLES B. DAY et al.,
Respondents.

BRIEF FOR APPELLEE.

POINTS.

That the entire text of the Illinois Statute, concerning Voluntary Assignments for Benefit of Creditors, may be before the Court, we append to this brief a copy of all the sections not already given in appellant's brief.

In Illinois, insolvent debtors may make *bona fide* sale, transfer or incumbrance of their estate, subject only to the limitation of the statute of May 22, 1877, in case of general assignments.

No law of Illinois makes it the duty of an insolvent debtor to make an assignment for benefit of creditors.

Appellant's bill is framed upon the theory, and alleges, that title to the assets sought to be reached passed to the assignees by the assignment of Day Bros. & Co.

Appellant's brief discusses a case in which the assets sought to be reached *do not* go to the assignee by the assignment, but have been previosly disposed of by the debtor so as to put them beyond the reach of himself or his assignee. In this respect appellant's brief mistakes the issues entirely, and discusses only questions which are not presented by this record. This record presents but one question, viz: Can a simple contract creditor of an assigned estate maintain a bill in equity, against the assignee and third persons, to reduce the assets *actually assigned* to possession of the assignee, without first having requested him to do it himself?

The 11th sec. of the assignment act vests all such causes of action in the assignee, and authorizes and requires him to sue for, collect and disburse them. No creditor can assume this function until after demand upon, and default of the assignee to assert title.

We concede that the authorities cited by appellants show that judgment creditors, after execution returned unsatisfied, may, notwithstanding the assignment act, maintain creditors bills to reach assets fraudulently conveyed before the assignment. But this is not a creditors bill, and that question is not involved in this case.

The authorities cited by appellants show that, if the facts alleged in the bill are true, the bill of sale, etc., to C. B. Day, and the assignment of Day Bros. & Co. are, by the law, construed together as one instrument, and that is a general assignment without preferences, which vests title to all the property in the assignees, and nothing in C. B. Day.

None of the cases cited touch the question whether a creditor of the estate may, or may not, maintain a bill in equity to collect assets of the estate vested in the assignee, until the assignee has, after demand, refused to assert his title.

The construction of the statute of assignments, in the particular in question, given by the circuit court in this case, is the first and only one ever put upon it by any court, state or federal, and would be entitled to prevail in this court, if found to be correct, even if a different construction had since been put upon it elsewhere.

The bill, failing to allege a demand upon the assignees, and refusal by them to enforce title, fails of the essential element to give the court of equity jurisdiction, and the demurrer was properly sustained.

ARGUMENT.

It is the law of Illinois, and ever has been since the State was organized, that an insolvent debtor may prefer

any of his *bona fide* creditors, even to the exhaustion of his whole effects, and may handle, sell or encumber his property in good faith, as any other owner, except as limited by the Assignment Act of May 22, 1877.

Thornton v. *Davenport*, 1 Scam. 296.
Bowden v. *Bowden*, 75 Ill. 143.
Miller v. *Kirby*, 74 Ill. 242.
Morris v. *Tillson*, 81 Ill. 607.
Nelson v. *Smith*, 28 Ill. 495.
Tomlinson v. *Matthews*, 98 Ill. 178.
Payne v. *Miller*, 103 Ill. 442.
Welsch v. *Werschem*, 92 Ill. 115.
Preston v. *Spalding*, 120 Ill. 217.

There is not, and never has been any law in Illinois making it the duty of an insolvent debtor to make an assignment for benefit of his creditors. He may do it or not, at his own option; but if he elects to assign, he cannot, since the adoption of the act in question, make preferences. And we are free to add that this inhibition extends, not only to the provisions of the deed of aseignment itself, but to all other instruments which are, in legal construction, one with it.

It is said (appellant's brief, p. 7) that this record presents two questions, viz: "Do the bill of sale to C. B. Day, and the general assignment for the benefit of creditors, constitute a single transaction? Second, If so, can a creditor maintain a suit in equity to set aside the bill of sale as preferential, and to enforce the trust for the equal benefit of all the creditors?"

We do not so understand. We do not understand that

the court below has passed judgment upon either of those questions; therefore, neither of them is before this court for review.

As to the first named question, complainants' bill alleges (Record pp. 2 and 3, margin 4, 5 and 6), "But inasmuch as by the laws of Illinois preferences are not allowed under such assignments, it was determined and agreed between said firm and the defendant Charles B. Day, that said laws should, if possible, be evaded by a pretended sale and preference to him. Accordingly the said Day Brothers & Co. made a bill of sale and transfer to him, on or about the 28th day of September, 1884, of all their merchandise, and certain other property, in pretended payment to him of their indebtedness to him, and to secure him against liabilities which he was under for said firm, but really to give him a preference over other creditors; * * * * that, ten days after said bill af sale was so made, said Day Brothers & Co., on the 8th day of October, 1884, made a voluntary assignment of all their property, for the benefit of all their creditors, to the defendants William Jack and Leslie D. Puterbaugh, who have duly qualified and are acting as such; * * * * that said bill of sale and transfer of the assets of Day Brothers & Co. to the defendants, Jack and Puterbaugh, are, in equity, parts of one and the same instrument, and together constitute a voluntary assignment for the benefit of creditors, with preferences, which preferences are unlawful, and that the entire property, conveyed by Day Brothers & Co. to defendant Charles B. Day, inures, by virtue of said instruments, in trust, from the date of its transfer, to the defendants, Jack and Puterbaugh, as assignees, and should be accounted for to

and be administered by them as such." Those facts, for the purpose of the demurrer, must be treated as admitted. The bill therefore settles the said first named question and there is nothing upon that point open for debate.

The opinion delivered by the Circuit Judge states definitely what the only question in the case is. That court say (Record p. 11), "It is clear no suit can be brought "by the creditors against the assignees and Day, until a de- "mand has been made upon the assignees to sue and they "have refused to do so. The bill does not allege that, before "this suit was brought, the creditors requested the assign- "ees to sue and they refused to comply. The assignees "are the proper parties to bring all suits to secure proper- "ty belonging to the estate.

"Without expressing an opinion upon any of the other "questions presented by the demurrer, it is sustained only "on the ground that the suit was brought by a creditor "without a demand being first made upon the assignees to "bring the suit."

There is therefore but one question presented by this record, and that is not, "Can a creditor maintain a suit in "equity to set aside the bill of sale as preferential, and to "enforce the trust for the equal benefit of all creditors." But, can they maintain such suit to recover property belonging to the estate, and vested in the assignee, *without having first requested the assignees to do so, and been refused?*

We do not deny that when an insolvent debtor determines to make an assignment, under the statute in question, and commences by executing instruments conveying

a portion of his effects to selected creditors, then executes the assignment, such instruments are to be construed together as constituting the assignment contemplated by the statute, and preferences expressed in either paper are void, and the assignee takes the whole property. And this is all we need say to all the cases cited to that point on pages 11 to 25, as we have no controversy with them.

Nor do we deny that if the assignee, upon demand of the creditor, refuses to sue for possession of effects of the estate, the creditor may bring suit in equity to recover them for the estate; though probably the better practice would be, to first apply to the County Court for an order upon the assignee to bring such suit, or for his removal and the appointment of another who would bring it.

The eleventh section of the act provides "That any "assignee or assignees, as aforesaid, shall have full power "and authority to * * * * sue for and recover, in "the name of such assignee or assignees, everything be-"longing or pertaining to such estate, real or personal." The title of all the assets is therefore vested in the assignee, for the purpose of suing for and collecting as well as disbursing; and to allow any and all creditors to prosecute suits, on behalf of the estate, to recover its assets, without ever requesting the assignee, or giving him an opportunity to do it, would be simply to multiply litigation and increase expense; and would also be a useless and unwarrantable disregard of the provisions of the statute.

To be sure, the bill attempts an excuse for not first requesting the assignees to sue, by assuming that they were unwilling to undertake any measures to recover the prop-

erty of the estate. (Appellee's brief, p. 4). But this is only the conclusion, or opinion, of the pleader. No facts are shown which excuse a demand, and there is no error in the finding of the circuit court that "The bill does not allege "that, before this suit was brought, the creditors requested "the assignees to sue, and they refused to comply."

There is no practice better settled in Illinois, both by statute, (Rev. Stat., Ch. 22, Sec. 40) and by judicial decisions, than that a creditor may maintain a creditor's bill against his debtor and other persons to set aside fraudulent conveyances and to reach equitable assets, *after*, but not *before* he has reduced his claim to a judgment, had execution issued and returned unsatified.

Bowen v. *Parkhurst*, 24 Ill. 275.
Ishmael v. *Parker*, 13 Ill. 324.
Stone v. *Manning*, 2 Scam. 530.
Miller v. *Davidson*, 3 Gil. 518.
Manchester v. *McKee*, 4 Gil. 511.
Bigelow v. *Andress*, 13 Ill. 322.
Greenwood v. *Thomas*, 14 Ill. 271.
Chicago, D. & V. R. R. Co. v. *Town of St. Anne.* 101 Ill. 151.
Goembel v. *Arnett*, 100 Ill. 34.
Scripps v. *King*, 103 Ill. 469.

But "this is not a creditor's bill, nor a bill of that "nature, and the rules of law in respect of such bills have "no application here." *Preston* v. *Spalding*, 120 Ill. pp. 214 and 215. Hence all the cases, with which appellant's brief abounds, of judgment creditors' bills to set aside fraudulent conveyances, made prior to the assignment, of

property which never went to the assignee, have no application to this case.

It is far from our purpose to maintain, as was unsuccessfully contended in some of the cases cited in appellant's brief, that the effect of the assignment act in question, is to take away the jurisdiction of the court of equity to entertain creditors' bills, to set aside fraudulent conveyances, made before the assignment, and discover equitable assets to satisfy judgments upon which execution had been returned unsatisfied. We do not perceive that the assignment act affects that remedy one way or the other. But this is a different proceeding entirely. It is an attempt of a *sinple contract creditor* of an assigned estate to exercise the functions of the assignee, by suing for assets which passed by the assignment and belong to the estate.

It is strenuously urged by appellants, and authorities cited at large, to show that the assignee takes no title to property fraudulently conveyed by the assignor prior to the assignment. And it is argued that because he takes no title, he has no interest in, and need not be made a party to a creditors' bill to set aside such fraudulent conveyance. We do not claim the contrary. But that reasoning does not touch the question in the present case. This is not a creditors' bill to recover property fraudulently conveyed by the debtor before the assignment; nor is it a suit by a creditor of the assigned estate to recover property fraudulently conveyed before the assignment, for it is insisted, and proved by appellant, that the assignment, consisting of the two instruments in question, passes no interest to property by fraudulent transfer. But it is a suit by an assignment creditors, against the assignees and a third per-

son, to recover, for the benefit of the estate, effects which, upon the theory of the bill, and by the doctrine of the cases cited by the appellant, *belong to the estate*, and the title to which *did* pass to the assignees by the assignment, and was not before that time fraudulently conveyed.

Therefore the only question which this case presents is: May an assignment creditor interfere, by suit in equity, against the assignees and third persons, to litigate and collect, for the benefit of the estate, the assets *which did in fact pass by the assignment*, without having first requested the assignee, entrusted by law with that duty, to prosecute his claim to them?

It would seem to us as if the question, when thus reduced to its true statement, is practically answered in the negative. We know of no decision or intimation of any court to the contrary. It is apparent that none of the cases cited in appellant's brief hold that the claims of an assigned estate may be so litigated and collected without such demand upon the assignee. And in none of them did that question arise. The decision of the circuit court in this case, is the first construction ever put upon the act, in the particular in question, by any court, State or Federal, so far as the cases cited show, and should be adhered to by the practice of this court without regard to later decisions, if it appear to be the better construction.

While it is true, as affirmed by appellant's counsel, that the courts hold with great unanimity, that transfers by an insolvent debtors, made by different instruments, on different days, in contemplation of a general assignment, will be construed together as one instrument, yet no court has, we venture to say, held that while such various

instruments are to be construed together as constituting one assignment, a part of the property transferred passes by that assignment to the assignee, and a part passes by it to third persons, as by prior fraudulent conveyance, and the assignee takes no title to it.

That which is, in law, one instrument of conveyance cannot pass title to the thing conveyed to the assignee, and at the same time retroactively pass title to third persons as by prior fraudulent conveyance. But this it must be held to do in order to furnish any room for a creditor to come in to set aside a fraudulent conveyance of assets passing by it to which the assignee does not hold the title.

The doctrine of all the cases, upon the point, cited in appellant's brief, is that the various instruments, executed in pursuance of the one design of making, in the end, a general assignment, and construed together as such assignment, vest the entire property described in them in the assignee, and that the fraudulent intent to prefer is void, and passes nothing to third persons. Hence whoever attempts to assert title to any of it is asserting the title of the assignee.

And this is also the plain foundation of appellant's case as stated in this bill. The bill is grounded upon the allegation that the bill of sale to C. B. Day, and the assignment to Jack & Puterbaugh, are one and the same voluntary assignment, and vested the title of all the property in the assignees. By what reasoning then is it that the title appellants are attempting to enforce is title to assets fraudulently conveyed prior to the assignment? All the authorities cited to the proposition that creditors may maintain a bill in equity to recover assets,

the title to which *did not go to the assignee*, have no application. And all the authorities cited to the proposition that the assignee takes no title to assets fraudulently conveyed before the assignment, have no application to this case; for the property in question was not, if the bill be true, conveyed prior to the assignment but *by the assignment*, and the assignee *did* take title to it. Therefore the argument that because the assignee takes no title to property fraudulently conveyed before the assignment, but creditors alone may reach it, by bill in equity, is based upon no facts in this case. And the conclusion that because creditors may proceed in equity to recover assets which *never vested in the assignee*, without first demanding that he bring the suit, they may therefore so proceed upon causes of action which *did vest in him* by the assignment, is very wide of the mark.

We do not deny that if a creditor makes reasonable demand upon the assignee to prosecute a real or apparent claim of the estate, and he refuses, a court of equity will, to prevent a failure of justice, sustain a bill by the creditor for that purpose. But, by law, the cause of action is in the assignee, and, *prima facie*, he has the right to determine what claims of the estate should be litigated, and we only maintain the soundness of the proposition that when the creditors differ with the assignee as to the policy of litigating any claim, they should advise the assignee of the facts, and request him to prosecute, before they can go into equity and prosecute it themselves.

Preston v. *Spalding*, 120 Ill., 208, most relied upon, and quoted *in extenso*, in appellant's brief, is against them upon all points. Both the jurisdiction of the Court over the

subject matter, and the creditor's right to maintain the bill, are there placed expressly upon the very ground that is wanting in this case, viz.: that demand had been made upon Freshwater, the assignee, to prosecute the rights of the estate and he had refused.

It is there said by the Court, (p. 215), to admit of no doubt but it is the right and duty of the assignee "to sue "for and recover, in his name and character as assignee, "every thing belonging or appertaining to the estate of "his assignor. * * * * Section 11, of the Voluntary "Assignment Act is both his warrant and his mandate." But, because he had refused to do so on demand, it is held that the creditor might, as *cistui que trust*, maintain the bill in equity. The case therefore holds, by direct inference, that, but for such demand and refusal, the creditor could not maintain the bill.

In that case, judgment notes, given to creditors by the insolvent debtors after they had determined to make an assignment, and the formal deed of assignment afterwards made, are construed together as one instrument, constituting the voluntary assignment. And it is held that the preferences expressed by the judgment notes, were void, and the proceeds of lumber levied upon in pursuance of judgments rendered upon those notes, were assets of the estate. So much of the decree of the Circuit Court as required those proceeds to be paid over to the assignee to be distributed in the County Court was reversed, not because the lumber did not pass to the assignee by the assignment, but solely because limitation, under the Assignment Act, would prevent its distribution equitably. This sustains our position that property intended to be passed to preferred creditors, by a prior instrument which the law con-

strues together with the deed of assignment as one transaction, passes by the assignment to the assignee, and is not property previously conveyed, which creditors alone can reach.

Colburn v. *Shay*, 17 Bradwell 289, cited in appellant's brief (pp. 28 and 29) is also a simple creditor's bill by judgment creditors after execution returned unsatified; and there was no claim that the act of the debtor, in disposing of the property sought to be reached, was done in view of the general assignment, or was to be construed as a part of it. In these respects that case is not in point upon any question in this case.

That case also rules that said assignment act does not repeal the jurisdiction of courts of equity to entertain the ordinary judgment creditors' bill for the purpose of reaching equitable assets which never had any connection with the assignment. The correctness of that view of the statute we have never questioned.

Bouton v. *Dement*, 14 N. E. Reporter 62, cited in appellant' brief (p. 29), is also an ordinary judgment creditors' bill after execution returned. And the court expressly find that no part of the proceeds of the equitable assets, sought to be reached, belonged to the assignee, because the judgment debtor had disposed of his interest in them long before his assignment. And there was no claim that such disposition was any part of the assignment or done in contemplation of it, or was to be construed together with it. The case is therefore not in point.

Appellant quotes at length (p. 30) Judge H. W. Blodgett's opinion in *Strong* v. *Goldman*, 8 Bissell 552, and concludes by saying (p. 32): "The foregoing decision is "decisive of the questions raised by this appeal, and it

"would doubtless have been followed by Judge Gresham "had it been called to his attention upon the argument."

It is assuming something which does not appear to affirm that the circuit judge did not know of a decision so recently made in his own court. But whether he was aware of that decision or not, a glance will show that he could not have followed it, for he was deciding one question, while Judge Blodgett decided an entirely different one. And both decisions are right so far as we can perceive.

Strong v. *Goldman* was also the ordinary judgment creditors' bill after execution returned unsatisfied. The assets sought to be reached had been disposed of by some undiscovered means, during four months prior to the assignment. No question existed in that case, as to whether the assets were disposed of by any means which should be construed together with the subsequent assignment as one transaction.

The only question decided in that case is that the said assignment act does not deprive the courts of equity of jurisdiction to entertain judgment creditors' bills of the character above named, to reach assets not claimed to have ever had any connection with the assignment. What the decision of that question had to do with the question whether a simple contract creditor of an assigned estate may maintain a bill, in his own name, to litigate the claims of the estate vested in the assignee, without demand upon, or the knowledge or consent of the assignee, is not easy to see. Was it to be expected that the circuit judge would hold that the two instruments, from which the law eliminated their attempted fraudulent preference, were to be construed together as one instrument, and that a statutory assign-

ment vesting the estate in the assignee; and yet the attempted fraudulent and void preference had, some how, so far succeeded that fraudulent title had become outstanding, which the assignee could not reach for the benefit of the estate, but an assignment creditor could! Such an effect of a general assignment would be absurd, were it not impossible.

Is it not obvious that, regardless of the number or date of the instruments by which a debtor assigns his property, if they are such that the law expunges attempted preferences and construes them all together as one instrument, constituting the statutory general assignment, then title to the property described in them all passes to the assignee, and he alone has the right to sue for and recover, until he has put himself in default of duty by refusing to prosecute on proper request.

We concede that judgment creditors may maintain a creditors' bill to reach assets fraudulently disposed of prior to the assignment, but that question, as we have shown, is not involved in this case.

We neither admit nor deny the proposition that simple contract creditors of the estate assigned may maintain a bill in equity to reach, for the benefit of the estate, assets which were fraudulently conveyed away by the debtor before the assignment, so that no title thereto passed to the assignee, because that question is not involved in this case.

What we maintain is that a simple contract creditor of the estate cannot maintain a suit in equity to recover assets which *did in fact* pass to the assignee by the assignment, so long as he has made no demand upon the assignee to sue for the same; and that when the debtor assigns his

property, by various instruments, which the law construes together as constituting one assignment under the Statute, it follows, as matter of course, that all property disposed of by those instruments, becomes assigned, and title thereto passes to the assignee, who is appointed by law to receive and assert it; therefore a creditor cannot assert and litigate that title by bill in equity in his own name, until the assignee has, upon demand, refused to assert the title.

The bill in this case is obviously an experimental proceeding, launched upon the uncertainties of the recent and unsettled Assignment Act, and in failing to allege a demand upon the assignee and refusal, it fails in the essential element to give the court of equity jurisdiction, and the demurrer to it was properly sustained for that reason.

Respectfully submitted on part of the defendants by

S. D. PUTERBAUGH ~~& PUTERBAUGH~~,
H. B. HOPKINS ~~& HAMMOND~~,

Solicitors.

APPENDIX.

AN ACT concerning voluntary assignments, and conferring jurisdiction therein upon county courts. Approved May 22, 1877. In force July 1, 1877. (Laws 1877, p. 116; Legal News Ed., p. 115.)

§ 1. Given in appellants' brief.

§ 2. That the assignee or assignees named in such assignment, shall forthwith give notice thereof by publication in some newspaper published in the county, if any; and if none, then in the nearest county thereto, which publication shall be continued at least six weeks, and shall also forthwith send a notice thereof by mail to each creditor, of whom he or they shall be informed, directed to their usual place of residence and notifying the creditors to present their claims under oath or affirmation to him within three months thereafter.

§ 3. That the assignee or assignees shall also forthwith file with the clerk of the county court where such assignment shall be recorded, a true and full inventory and valuation of said estate, under oath or affirmation, so far as the same has come to his or her knowledge, and shall then and there enter into bonds to the people of the State of Illinois for the use of the creditors in double the amount of the inventory and valuation, with one or more sufficient sureties to be approved by said clerk, and the said clerk shall give a receipt therefor, and the assignee or assignees may thereupon proceed to perform any duty necessary to carry into effect the intention of said assignment as respects the collection of debts and the sale of real estate or personal estate. Which said bond shall be taken in the name of the people of the State of Illinois and the condition shall be as follows:

The condition of this obligation is such that if the above bound ..... assignee of..... ..... shall in all things discharge his duty as assignee of.....as aforesaid and faithfully execute the trust confided to him, then the above obligation to be void, otherwise to remain in full force.

§ 4. That at the expiration of three months from the time of first publishing notice as before provided, the assignee or assignees shall report and file with the clerk of the county court, as aforesaid, a true and full list, under oath or affirmation, of all such creditors of the assignor or assignors, as shall have claimed to be such, with a true statement of their respective claims, and also an affidavit of publication of notice and a list of the creditors with their places of residence and the date of mailing, to whom notice has been sent by mail, duly verified.

§ 5. That any person interested as creditor or otherwise, by himself or attorney may appear within thirty days after filing such report, and file with said clerk any exceptions to the claim or demand of any creditor's exhibit as aforesaid, and the clerk of said court upon such person, by himself or attorney, filing in said court good and sufficient bond for cost, to be approved by the clerk, and executed in the same manner and to like effect in law as is now required in *qaitam* actions as provided in sections one and two of an act entitled "An act to revise the law in relation "to costs," approved February 11, 1874, shall forthwith cause notice thereof to be given to the creditor, which shall be served as in case of an original notice in the county court in said county; and the said county court shall, at the next term, proceed to hear the proofs and allegations of the parties in the premises, and shall render such judgment thereon as shall be just, and may allow a trial by jury thereon.

§ 6. Given in appellants' brief.

§ 7. Given in appellants' brief.

§ 8. That no assignment shall be declared fraudulent or void for want of any list or inventory as provided in the first section of this act. The county court of the county may upon application of the assignee or assignees, or any creditor, compel the appearance in person of the debtor or debtors before such court, by citation returnable forthwith, or at the next term of court, and by attachment to answer,

under oath, such matters as may then and there be required of him, her or them; and such debtor or debtors may then and there be fully examined under oath, as to the amount and situation of his, her or their estate, and the names of the creditors and amounts due to each, with their places of residence; and may compel the delivery to the assignee or assignees, of any property or estate embraced in the assignment.

§ 9. That the assignee or assignees shall from time to time, file with the clerk of the county court an additional inventory and valuation of any additional property or estate which may come into his or their hands under said assignment after the filing of the first inventory, and the clerk may thereupon require additional security by bond, as upon the filing a first inventory.

§ 10. That any creditor may claim debts to become due as well as debts due, but on debts not due a reasonable abatement shall be made when the same are not drawing interest, and all creditors who shall not exhibit his, her or their claim within the term of three months from the publication of notice as aforesaid shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the county court.

§ 11. Given in appellants' brief.

§ 12. That in case any assignee shall die before the closing of his trust, or in case any assignee shall fail or neglect for the period of twenty days after the making of any assignment, to file an inventory and valuation, and give bonds as required by this act, it shall be the duty of the county judge of the county, where such assignment may be recorded, on the application of any person interested as creditor or otherwise, to appoint some one or more discreet and qualified person or persons to execute the trust embraced in such assignment; and such person or persons on giving bonds with sureties as required above of the assignee or assignees named in such assignment, shall possess all the powers thereby, and by this act conferred

upon such assignee or assignees, and shall be subject to all the duties hereby imposed as fully as though he or they are named in the assignment, and in case any security shall be discovered to be insufficient, or on complaint before the county court it shall be made to appear that any assignee or assignees are guilty of wasting or misapplying the trust estate, said county court may direct and require the giving additional security, and may remove such assignee or assignees, and may appoint others in their stead to fulfill the duties of said trust; and such person so appointed on giving bond shall have full power to execute such duties, and to demand and sue for all estate in the hands of the person or persons removed, and to demand and recover the amount and value of all moneys and property or estate so wasted and misapplied, which he or they may neglect or refuse to make satisfaction for, from such person or persons, and his or their sureties.

§ 13. Given in appellants' brief.

§ 14. Given in appellants' brief.

§ 15. All proceedings under the act of which this (Section) is amendatory, may be discontinued upon the assent, in writing, of such debtor, and a majority of his creditors in number and amount; and in such case all parties shall be remitted to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of; and the court shall have power to make all needful orders, to carry the foregoing provision into effect.